

Original.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

CHARLES LUX, et al.,

vs.

JAMES B. HAGGIN, et al.,

Appellants.

Respondents.

No. 8587.

CHARLES LUX, et al.,

vs.

JAMES B. HAGGIN, et al.,

Appellants.

Respondents.

No. 8588.

Respondent's Points & Authorities.

Louis T. Haggin,

Attorney for Respondent.

Carber, Thornton & Bishop,
Flournoy, Mhoon & Flournoy,

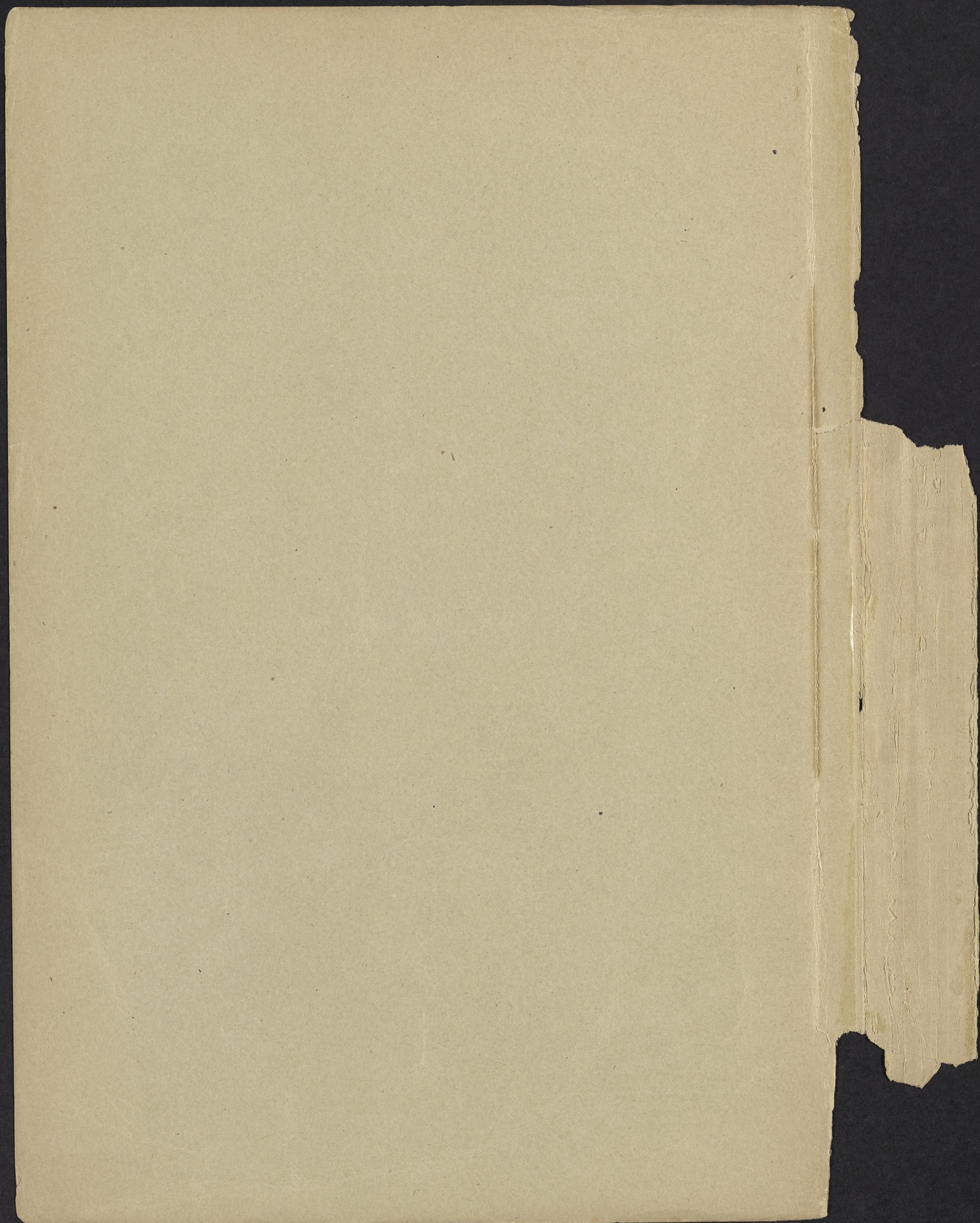
of Counsel for Respondent.

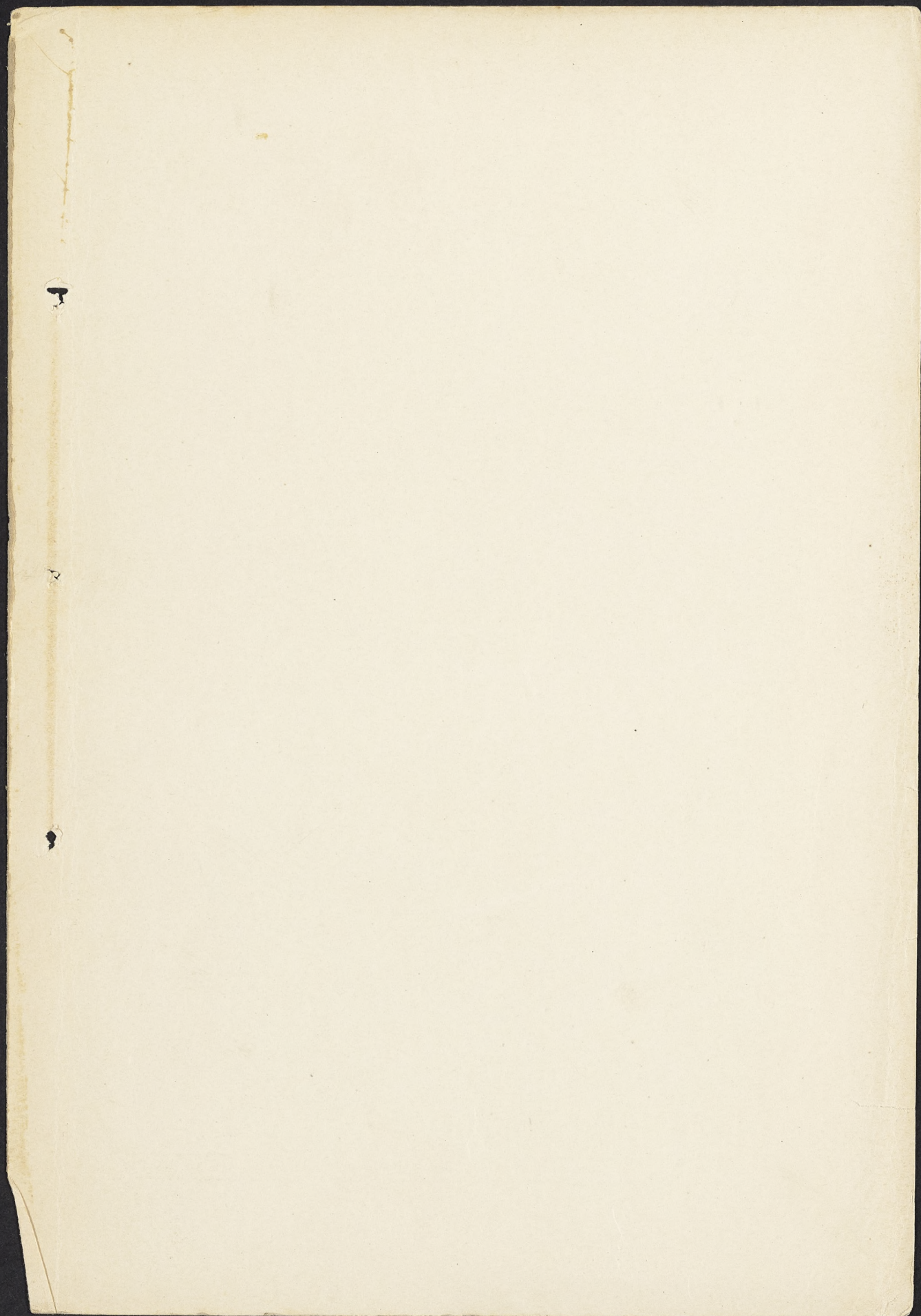
Filed *September 5* 1883.
J. M. Carney Clerk.
By *J. S. Williams* Deputy Clerk.

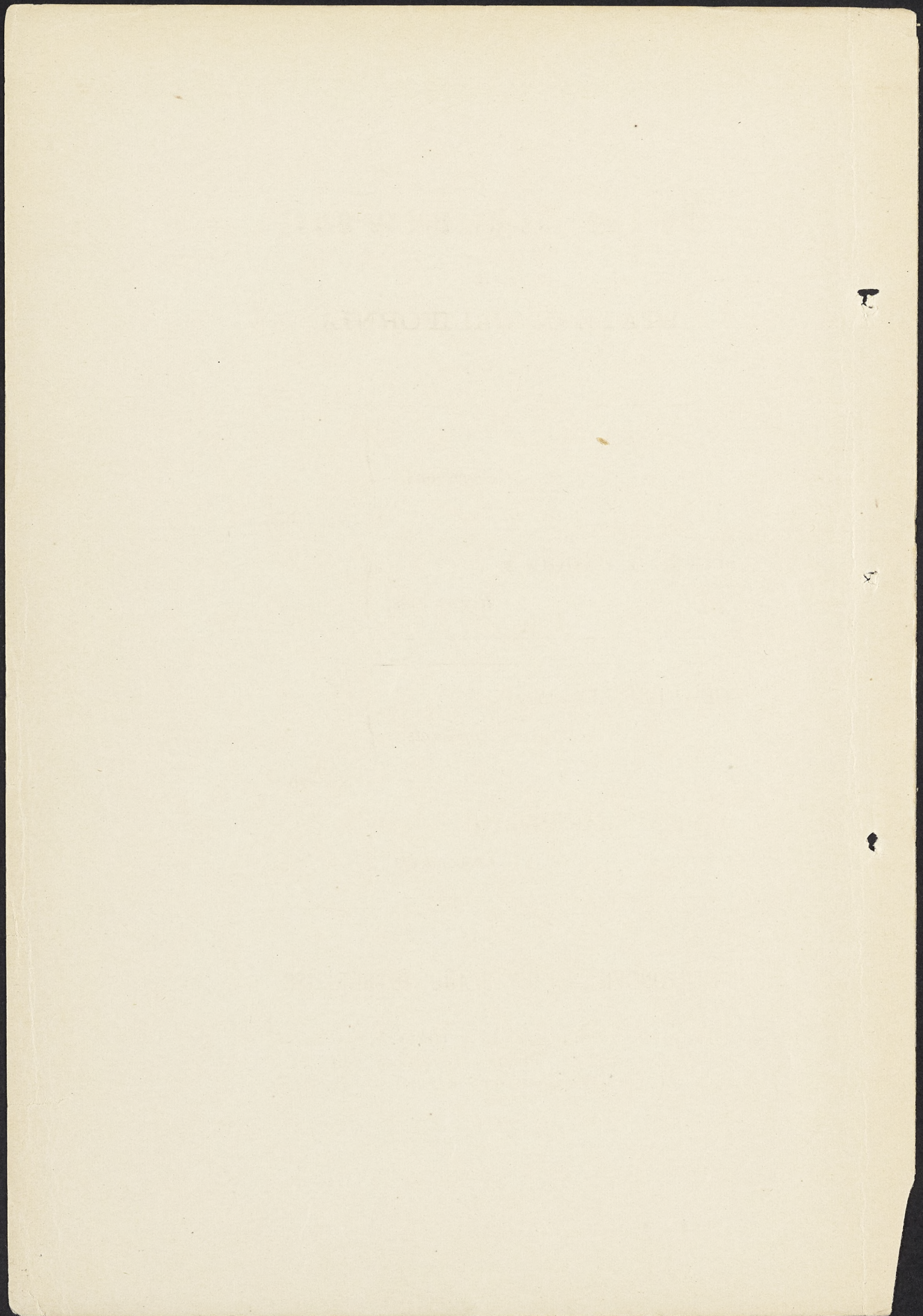
SAN FRANCISCO:

GEO. SPAULDING & Co., GENERAL BOOK AND JOB PRINTERS,

1883.







In the Supreme Court

OF THE

STATE OF CALIFORNIA.

CHARLES LUX ET AL.,

Appellants,

vs.

JAMES B. HAGGIN ET AL.,

Respondents,

No. 8587

CHARLES LUX ET AL.,

Appellants,

vs.

JAMES B. HAGGIN ET AL.,

Respondents.

No. 8588

RESPONDENT'S POINTS AND AUTHORITIES.

May 12th, 1879, Charles Lux, Henry Miller, James C. Crocker, and six others, commenced this action against James B. Haggin, The Kern River Land and

Canal Company, and one hundred and seventeen other defendants, whereby, alleging themselves riparian proprietors on the banks of Kern River, they sought to perpetually enjoin each of the defendants from diverting any of the waters of said stream, and asked damages for the diversions already committed. Subsequently, however, the six plaintiffs other than Lux, Miller and Crocker, withdrew from the suit, and the action was dismissed as to all defendants except The Kern River Land and Canal Company.

The present plaintiffs then filed their amended complaint. Defendant answered, denying most of plaintiffs' allegations and setting up much new matter in defense. Plaintiffs moved to strike out portions of the answer. The motion was denied. The action was then tried by the Court without a jury, and judgment was rendered for defendant. Plaintiff appealed from the judgment and then moved for a new trial, the motion being denied they also appealed from the order denying their motion. Thus two appeals in the same action are now before this Court. These appeals are argued and submitted together.

PLAINTIFFS' CASE.

Plaintiffs (the appellants), owning, as tenants in common, certain lands in Kern County, claim that said lands are situated along and upon Buena Vista Slough, through which, say they, the waters of Kern River flow and ever have flowed along, by, through, over and upon their lands, irrigating them and making them fit for cultivation and pasture, besides supplying water thereon for stock, agricultural, domestic and other purposes; and they claim that, by virtue of their ownership thereof, they are riparian proprietors, and, as such, are entitled to have the waters of Kern River flow to them as it has been wont to flow, undiminished in quantity, and without deterioration in quality.

They allege that the defendant has, at a point above their lands, diverted and appropriated a portion of the waters of said river, and prevented the same from flowing to them, as it would have done, say they, were it not for such diversion and appropriation. They did allege that the diversion by defendant was an injury, a damage to them, but on the trial of the case, having failed to show wherein they were injured, or in what manner damaged, they dismissed their suit for damage, and asked for an injunction alone.

DEFENDANT'S CASE.

Defendant denies that plaintiffs are riparian proprietors. It denies that plaintiffs have any right to or interest in the waters of Kern River, or are in any manner entitled to have said waters or any part thereof flow to their said lands. It denies that plaintiffs' lands are situated along or upon any natural stream or water-course, or even upon Buena Vista Slough itself, except in so far as they lie within the bed

and between the banks of Buena Vista Swamp, to which the name of Buena Vista Slough is sometimes applied. It denies that any natural stream or water-course flows along, by, through, over or upon said lands or any part thereof.

Defendant contends that, even should it be admitted that the waters of Kern River naturally and usually flow through a continuous and well-defined channel to, through, over and upon plaintiffs' lands, still, as against defendant, plaintiffs are not entitled to any relief, legal or equitable, for:

1st. The so-called doctrine of Riparian Rights whereby a proprietor of land bordering upon a running stream is presumed to have a right to the full, free and uninterrupted flow of the waters of such stream, is not and never has been the law of this State; at least, so far as appertains to State or Government lands as contra-distinguished from those held by Mexican grant.

2d. Whatever be the applicability of the doctrine of Riparian Rights as to other lands it is not applicable to the swamp and overflowed lands donated to the State by Act of Congress of September 28th, 1850.

3d. Whether applicable or not to lands granted by the State prior to May 1st, 1872, at which date Title VIII, Part IV, Division II of the Civil Code, went into effect, this doctrine of Riparian Rights is not applicable to any lands owned by the State at any time subsequent to that date.

4th. Assuming that the doctrine of Riparian Rights prevails within this State, defendant, as the licensee of the Government of the United States, the supra-riparian proprietor, is entitled to take out and divert, use and consume the amount of water by it diverted for the uses and purposes to which such water has been applied, the amount thereof being reasonable and not disproportionate to the size of the stream and the uses to which it has been applied being the supplying of natural wants.

5th. By virtue of a compliance by itself, its predecessors in interest and grantors with the general and local customs well established and recognized as the common law of the United States and of this State in the matter of and relative to the appropriation, diversion and use of water and the acquisition of water rights within the State of California, as well as with the Statute laws of the United States and of this State on such subjects made and provided, defendant has appropriated, acquired, and become entitled to, and now is entitled to, and of right may take out, appropriate, divert, use and consume 74,000 inches measured under a four-inch pressure of the flowing waters of Kern River; and its right so to do is prior and superior to any rights, riparian or otherwise, which plaintiffs have in or to the waters of said stream.

6th. Plaintiffs were guilty of such laches and acquiescence as under the circumstances of this case disentitles them to relief in equity.

7th. Plaintiffs, having licensed and encouraged the Kern Valley Water Company to, at great cost and expense, intercept at a point above plaintiffs' lands and there take possession and control of, appropriate and divert for its own uses and purposes, all waters which would otherwise reach said lands, cannot now, as against defendant, maintain a right to the uninterrupted flow of the waters of Kern River.

8th. That defendant's diversion of the waters of Kern River is a trespass, if trespass at all, upon the rights of other canal owners owning canals along the course of said river who, by valid appropriation or prescriptive use, have become entitled to the waters of said stream, and not upon any Riparian Rights which plaintiffs may have.

THE FACTS.

Plaintiffs own certain lands in Buena Vista Swamp, Kern County, granted to them by the State of California in sundry lots and at various times, all, however, subsequent to January 1st, 1876. These lands are of that class known as "swamp and overflowed lands" donated to the State by the Federal Government for the purpose of reclamation, under the Act of September 28th, 1850 (commonly called the "Arkansas Act"), and as such belonged to the State until they were so granted to plaintiffs.

[We append to this Statement of Facts certain diagrams showing the exterior boundaries of Buena Vista Swamp, the several tracts of plaintiffs' lands and the respective dates on which they were granted by the State, also the positions of said tracts with reference to the *traceable channel* of Buena Vista Slough, described in Finding No. 71.]

Kern River is a natural stream or water-course rising in the Sierra Nevadas and debouching into the plains at a point about ten miles northeasterly from the Town of Bakersfield, in Kern County, whence, as far down as to a point in Sec. 17, T. 29 S., R. 28 E., M. D. B. & M., it has always flowed in the same channel; but, after reaching said point, the course of the river was anciently, and until to the winter of 1861-2, in part along a channel known as the "South Fork," which there diverged to the left or southerly and, following a course almost due south, emptied into Kern Lake at its easterly end, and in part along the present channel of the river to a point some three or four miles further westward, and thence to the left or southerly along the channel known as

"Old River," which, following a southwesterly course, emptied into Kern and Buena Vista Lakes; but until the winter of 1861-2, the South Fork was the main channel of the river. In the winter of 1861-2 a flood closed the South Fork at its head, and thenceforth until the winter of 1867-8, the natural flow of the waters of Kern River was to and through Old River; but in times of very high water some water would pass beyond the head of Old River and following the course of the channel known as "New River" down to about Sec. 31, T. 29 S., R. 27 E., would there turn to the right or northward and continue along what is known as "Goose Lake Slough." In the winter of 1867-8, another flood opened up the present channel of New River below Goose Lake Slough; and in the winter of 1868-9 another closed Goose Lake Slough at its head.

After the flood of 1867-8 the waters of Kern River, in their natural flow and at ordinary stages, divided at the head of Old River and one-half thereof continued down Old River, and the other half (except such portions as passed into Goose Lake Slough), followed the present channel of Kern River, known as "New River." Such continued to be the flow of the waters of Kern River until the fall of 1877, when the Stine Canal Company built a head gate across Old River at its head and, thereby obstructing the free flow of the waters into Old River, turned the greater portion thereof down the channel of New River, which has thenceforth been the main channel of Kern River. From and after the flood of 1867-8 the waters flowing down New River (except such portion thereof as passed into Goose Lake Slough) continued, in their natural flow, to and into Buena Vista Slough and thence to and into Buena Vista and Kern Lakes.

After leaving Old River, New River follows a southwesterly course and joins Buena Vista Slough at a point known as "Cole's Crossing," in or about Sec. 5, T. 31 S., R. 25 E. Before reaching Cole's Crossing, however, the river divides, at a point

in Sec. 23, T. 30 S., R. 25 E., into two channels, the one known as the "South Branch" and the other as the "North or Middle Branch;" but the main flow of its waters and the natural course thereof is through the South Branch. About half a mile down the North or Middle Branch from the point where it diverges from the South Branch there are tracings of an old slough known as "Gage Slough," which connects with Buena Vista Slough at about the southwest corner of Sec. 19, T. 30 S., R. 25 E., but, as it does not appear that any water (except such as has been artificially turned therein for stock or irrigating purposes) has flowed through Gage Slough, said slough can in no manner be deemed one of the channels of Kern River. After leaving the South Branch this North or Middle Branch continues in a southwesterly direction to about the middle of the section line between Secs. 27 and 28, T. 30 S., R. 25 E., and there divides itself into two channels, the one a shallow channel through which no water flows, except in time of high water, continuing to and connecting with Buena Vista Slough at the southeast corner of Sec. 30, T. 30 S., R. 25 E., the other turning almost due south and joining the South Branch in the vicinity of Cole's Crossing; but, whether passing through the one or through the other of these channels, the waters of the North or Middle Branch, after reaching Buena Vista Slough, continue, in their natural flow, to Buena Vista and Kern Lakes.

Kern and Buena Vista Lakes occupy the head or southern end of the valley formed by the Sierras on the east and the Coast Range on the west, and lie to the south of Kern River. In their natural condition these lakes, when full, form one continuous body or sheet of water some twenty miles in length and from five to six miles broad.

Buena Vista Slough extends from the extreme northwestern end of Buena Vista Lake to Buena Vista Swamp, within which plaintiffs' lands are situated. Said swamp itself is a strip of low land ex-

tending northward to Tulare Lake, some thirty or forty miles long and from three to five miles wide, lying on the western side of the valley and in the trough thereof. But between said swamp on the one side and Kern and Buena Vista Lakes on the other, extending clear across the valley from the point where Kern River enters the plains on the east to the foot-hills of the Coast Range, which rise near by and immediately west of Buena Vista Slough, there is a ridge or stretch of high land dividing the basin of Kern and Buena Vista Lakes from the basin or trough occupied by Buena Vista Swamp and Tulare Lake. The slope of this ridge is greater and more precipitous southward towards Kern and Buena Vista Lakes than it is northward or towards Buena Vista Swamp and Tulare Lake. From the point where Kern River enters the plains it follows generally along the crest of this ridge, bearing, however, southward and keeping on the southern slope thereof to Buena Vista Slough, through which, since the formation of New River and until prevented by certain artificial obstructions at Cole's Crossing, it has emptied its waters, there reaching, into Buena Vista and Kern Lakes; and said ridge, extending across Buena Vista Slough at a point north of where New River enters it, has, until the construction of the aforesaid obstructions at Cole's Crossing, prevented said waters from flowing northward towards Buena Vista Swamp, except in times of flood or overflow.

So the natural drainage of Kern River and of the surrounding country is and ever has been to and into Kern and Buena Vista Lakes, and the natural, usual and accustomed flow of the waters of said river, whether through the South Fork, through Old River, or through New River, is and has ever been to and into said lakes, the natural, usual and accustomed receptacle, terminus and place of discharge thereof and therefor.

Occasionally, however, in the winter or spring-time of the year, floods or freshets, from excessive rain or melting snow, will cause the river or the lakes to over-

flow their banks, and a portion of such overflow will find its way northward to Buena Vista Swamp and over some of plaintiffs' lands, following, however, no defined course or channel, but spreading generally from side to side throughout the swamp and squandering itself over the surface thereof as far northward as the water reaches. Again, it seems that throughout said swamp there is a surface stratum of decomposed vegetable loam underlying which is a bed of sand, whilst scattered through the swamp are innumerable holes or depressions from a few inches to some twelve or fifteen feet deep, and that, owing to the nature of the sub-soil and the character of the country, water from Kern River or Buena Vista Lake percolates and seeps through to and rises in these holes and depressions and at times spreads or flows from one to another, but in no continuous channel or defined course.

As above stated, Buena Vista Slough extends from Buena Vista Lake to Buena Vista Swamp. Said slough is also traceable into said swamp as far northward as the "Bonestell Place" in Sec. 24, T. 29 S., R. 23 E.; but there it terminates and can be traced no further. From the point where New River enters it northward to said swamp, said slough is continuous and well defined, but after reaching said swamp to its northern extremity, in Sec. 24, its channel is not continuous nor well defined with bed and banks, but is shallow and in places detached and consists mere of a series of holes than a regular waterway. Before terminating at its northern end, however, this traceable channel cuts across the west half of Sec. 10, and the northeast quarter of Sec. 5, T. 30 S., R. 24 E., portions of plaintiffs' lands (the first having been granted to them on the 14th day of June, 1877, and the second adjudged to them in *People vs. Center* on the 17th day of September, 1878), but it nowhere touches any other of plaintiffs' lands. Whatever waters have gotten down into said swamp, without the aid of artificial obstructions, before reaching any of plaintiffs' lands, have not been con-

fined to said traceable channel, but have spread generally and indefinitely over the swamp, and do not constitute a regular flowing stream, but consist, in addition to the seepage and percolation mentioned, of occasional bursts of water which in time of freshets or melting snow overflow the banks of the river above or flow out of Buena Vista and Kern Lakes, after having been stationary therein, and inundate the whole swamp as far northward as the water reaches. It seems, too, that the name "Buena Vista Slough" is applied to that portion of the slough or channel northward from Buena Vista Lake until it reaches Buena Vista Swamp, but after reaching the swamp and ceasing to be well defined or continuous, as above stated, it ceases to be distinguished as "Buena Vista Slough," and the term "Buena Vista Slough" is then applied to, and used to designate the whole swamp and not any particular channel therein.

[Defendant contends that even were it conceded that a stream or water-course exists within the swamp it is the swamp itself which constitutes the bed thereof, and that the banks and boundaries of such stream are the public lands of the United States coming up to the segregation lines of the swamp and overflowed land.]

Prior to the formation of New River, Buena Vista Slough was a sort of drain or outlet through which at times Kern and Buena Vista Lakes, overflowing their banks, would discharge their surplus waters into Buena Vista Swamp; but the flood of 1867-8 in opening up the channel of New River carried down large quantities of earth, sand and other matter and depositing the same in and near said slough north of Buena Vista Lake and south of Buena Vista Swamp, filled up the slough at that point and by enlarging the surface area and the holding capacity of said Lakes, rendered less frequent the overflows therefrom; and each year since said flood more sand and sediment, as well as brush and other matter brought down by the river, has been

deposited in and near said slough, thereby still further increasing the capacity of said lakes and rendering still less frequent the overflows therefrom.

In the fall of 1876 certain parties commenced the construction of two certain canals known, respectively, as the "East Side Canal" and the "Kern Valley Water Co.'s Canal." The East Side Canal commences on Sec. 14, T. 30 S., 24 E., and extends thence some three miles north on the eastern side of Buena Vista Swamp, but does not touch any of plaintiffs' lands; the other canal, heading on Sec. 14, T. 30 S., R. 24 E., as at present constructed, extends northward along the western margin of the swamp some twenty-four miles and terminates at a point outside of plaintiffs' lands. In June, 1877, the Kern Valley Water Company, a corporation organized for the purpose of acquiring canals and water rights, etc., in Kern County, took possession and control of said canals and thenceforth continued the construction thereof northward toward Tulare Lake. In the fall of 1877 the Kern Valley Water Company constructed a dam across the slough at Cole's Crossing, south of where New River enters it and, in connection therewith, a levee extending westward to the bluffs or high ground and running eastward from said dam about a mile and a quarter, thereby preventing the waters of New River from flowing to Buena Vista Lake and turning the same northward to the said canals. At the head of said canals and in conjunction therewith the Kern Valley Water Co., in 1877, constructed a certain other dam and levee along the southern portion of Secs. 14 and 15, T. 30 S., R. 24 E., completely across the swamp and thereby obstructed and prevented the natural flow of any water into, through or over said swamp northward of said levee, and appropriated and took possession and control of all waters which reached said levee and turned the same into said canals. The said dam and levee last mentioned are some distance south of the southernmost part of plaintiff-

iffs' lands, and were constructed for the purpose of diverting and appropriating all the waters there reaching, and from and after their construction no water has naturally flowed or could naturally flow beyond the head of said canals or to or upon plaintiffs' lands. The construction of said canals, dams and levees was undertaken and prosecuted with the knowledge, consent and approval of plaintiffs, who, both before and at the time of their construction, knew of the purposes for which they were undertaken.

In August, 1878, plaintiffs began to cultivate and thenceforth hitherto have cultivated the west half of Sec. 10, T. 30 S., R. 24 E. But it does not appear that plaintiffs have ever made use of any of the waters of Kern River, except upon one or two occasions subsequent to August, 1878, when a small amount was given them by the Kern Valley Water Company for irrigation on the west half of said Sec. 10.

From the South Fork down to Buena Vista Slough, a distance of about twenty-five miles, there are on both sides of Kern river, and extending many miles therefrom, large tracts of land embracing many thousands of acres, very valuable and productive when artificially irrigated, but which when not so irrigated are barren, unproductive and valueless. Said lands can only be irrigated by appropriating, diverting and conveying to them the waters of Kern river; and from the very earliest settlement of that section of country—as far back as the year 1864, and even earlier—it has been customary for all parties so desiring, to divert, appropriate and convey said waters on to said lands for irrigation and other beneficial purposes, and many canals therefor have been constructed, and valuable prescriptive and other vested rights to the waters of said river have been acquired.

The defendant in this suit is a corporation, incorporated on the 18th day of May, 1875, for the purposes,

amongst others, of constructing the Calloway Canal, and supplying water to the lands adjacent thereto for irrigation and other purposes.

On the 4th day of May, 1875, the grantors of defendant desiring to appropriate 74,000 inches of the waters of Kern river, measured under a four inch pressure, for the purpose of irrigating the lands along the route of and susceptible of irrigation by the Calloway Canal as at present constructed, and for other beneficial uses, posted a notice in writing in a conspicuous place at the point of intended diversion, viz: a point on the north bank of Kern river in sec. 13, T. 29, S. R. 27 E., where the Calloway Canal now diverges from the river, and in said notice set forth and stated: 1st, that they claimed the waters of Kern river there flowing, to the extent above mentioned; 2d, the purposes for which they claim it and the place of intended use; and 3d, the means by which they intended to divert the water and the size of the ditch through which they intended to divert it. A copy of said notice was, within ten days after it was posted, duly recorded in the office of the County Recorder of Kern County, the county within which said notice was posted. The said notice was signed by the grantors of defendant, who, within sixty days after the posting thereof, by their voluntary association, formed the corporation defendant, and granted and conveyed to it all their said water right, privilege and claim, and all their claim to the waters of Kern river, and all rights and privileges acquired by them by virtue of the Calloway appropriation and canal; and thereupon and within sixty days after the posting of said notice defendant surveyed and staked out the line of the canal as now constructed, and as described in said notice of appropriation, and began the excavation and construction of said canal, and thenceforth up to the commencement of this action prosecuted the work diligently and uninterruptedly, and at the time of the commencement of this action had constructed said canal to a point where it crosses Poso creek, in Sec. 26, T. 26 S., R. 25 E., a

distance of about thirty miles from its head on Kern river, of the following dimensions, to-wit: One hundred and twenty (120) feet wide at the bottom, with a grade of four (4) feet per mile for the first two and a half ($2\frac{1}{2}$) miles from the said point where it heads on Kern river; then sixty (60) feet wide on the bottom a distance of about two (2) miles, with a grade of eight-tenths (8-10) of a foot per mile; then eighty (80) feet wide on the bottom for a distance of about three miles, with a grade of eight-tenths (8-10) of one foot per mile; then eighty (80) feet wide on the bottom to Poso Creek, with a grade varying from eight-tenths (8-10) to four tenths (4-10) of one foot per mile, and having a capacity to carry more than six hundred (600) cubic feet of water per second, but not sufficient to carry the amount of seventy-four thousand (74,000) inches, measured under a four-inch pressure, claimed in the notice of appropriation; and had also constructed thirty (30) miles or more of main side or distributing ditches, of from twelve (12) to sixteen (16) feet in width on the bottom, connected with and leading from said main canal and forming a part of its irrigation system, and irrigating and supplying with water, lands along the route of and susceptible of irrigation by said main canal; and had expended in constructing said main canal and side ditches more than one hundred and ten thousand (\$110,000) dollars. And from the commencement to the trial of this action, defendant has diligently and uninterruptedly continued to prosecute the work of constructing the said main canal and branch ditches, and has constructed more than fifty (50) miles of branch or distributing ditches, from twelve to sixteen feet wide on the bottom, in addition to those constructed before the commencement of the action.

In the Fall of the year 1875, in pursuance and execution of the intention expressed in said notice of appropriation, defendant dug away and removed a part of the bank of Kern River at the head of said canal, and thereby diverted and appropriated for the purpose of soften-

ing the earth and facilitating the construction of said canal, a small quantity of the waters of Kern River; and since the year 1875, as the construction of said canal progressed, defendant has each year diverted through said canal and conveyed through it and said ditches to the capacity of said Calloway Canal, a portion of the waters of Kern River, and has appropriated and applied the same to useful and beneficial purposes; that is to say, to irrigating and supplying with water lands in said notice of appropriation designated, and lying along the route of said canal; and all of said water so diverted by defendant has been needed, used and consumed on said lands.

In all matters and things connected with or relating to said appropriation and diversion of water, defendant and defendant's grantors have fully complied with the provisions and requirements of Title VIII, Part IV, Division II of the Civil Code.

The lands designated in said notice and to irrigate which the waters of Kern River were appropriated and the Calloway Canal was constructed, border upon Kern River and extend therefrom northward in one compact body along the route of said canal. To said lands irrigation is a necessity, and there is no means of irrigating them save by the waters of Kern River appropriated through the Calloway Canal. Without the water furnished them by the Calloway these lands would be as they had always been before its construction, desert and barren, unproductive and worthless, but with that water they have proven highly productive and valuable and large portions of them are now settled upon and cultivated by many people. As, each succeeding year, it will require less and less water to irrigate each acre of these lands, by reason of the fact that when dry and first irrigated they absorb more water than afterwards when constantly irrigated, the water now conveyed by the Calloway will hereafter be sufficient to irrigate seventy thousand acres thereof.

The use to which the water diverted by defendant is

applied is to supply a natural want, and the quantity taken is necessary and reasonable.

At and during the times when the acts constituting the appropriation and diversion by defendants and its grantors were done, plaintiffs knew and were fully informed of the intention of defendant and its grantors to make said appropriation, and of the extent and purposes thereof, and knew that in reliance upon its acquisition of the right to the said water appropriated, defendant was expending, would expend, and had expended large sums of money in the construction of its said works, and were fully informed of all the circumstances surrounding and attending the location, construction and maintenance of said canal and works of defendant, and of the character of said lands, and knew that if prevented from using said water so appropriated, all the said labor, expenditure and effort of the defendant would be fruitless and a total loss. Yet, until the commencement of this action, plaintiffs made no objection to said appropriation or to said acts of the defendant, but acquiesced therein and stood by while defendant from the year 1875 to the 12th day of May, 1879, continued the construction of its canal and each year diverted the waters of Kern River and applied the same to the irrigation of said lands. Until the commencement of this action defendant did not know that plaintiffs had or claimed any rights in or to the waters of said river, nor did plaintiff notify defendant that they made any claim thereto; and all acts and things done by defendant in and about the diverting and consuming the waters of Kern River by it diverted, were done in the full faith and bona fide belief that, as the prior appropriator of such waters, it had the right to do and commit such acts.

Kern River is not, throughout its whole course down to Buena Vista and Kern Lakes, a perennial stream, nor, during the period of its flow, are the waters therein

flowing uniform or constant in amount or volume; but the volume and amount of said waters vary and are subject to great and sudden fluctuations. Generally the irrigation season along Kern River is from February to July; usually, during said irrigation season, there is ample and abundant water flowing down said river, not only to fill the canals and ditches heading on said river, including that of defendant, and furnish and supply to them sufficient water to irrigate the lands by them irrigated, but also to flow to Buena Vista Slough, and, since the construction of the dam and levee at Cole's Crossing and the turning of the waters, there reaching, northwards, to wet up and thoroughly irrigate all the lands in Buena Vista Swamp, and supply water thereon for all useful and needful purposes.

During the irrigation season of the year the amount of water diverted from Kern River by defendant is not sufficient to materially affect, or substantially diminish, the volume or amount of water usually reaching Buena Vista Slough; and during the balance of the year none of the water by defendant diverted would, if not so diverted, ever, in its natural flow, flow to or reach plaintiffs' lands.

The foregoing facts were found by the Court below, and are amply supported by the evidence. Most of them are accepted by appellants as incontrovertible. To some, however, they make objection and specify the particulars in which they deem the evidence insufficient.

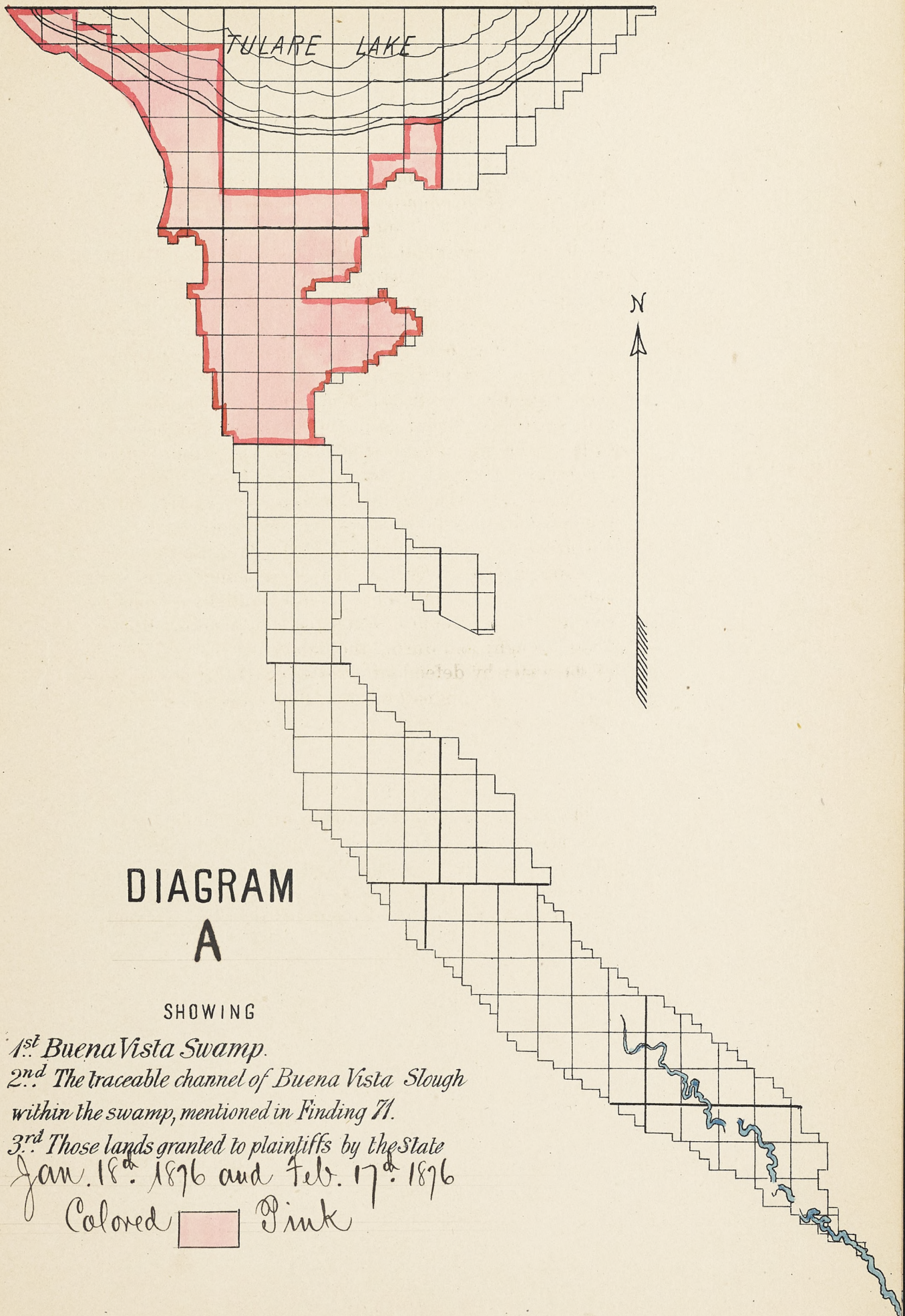
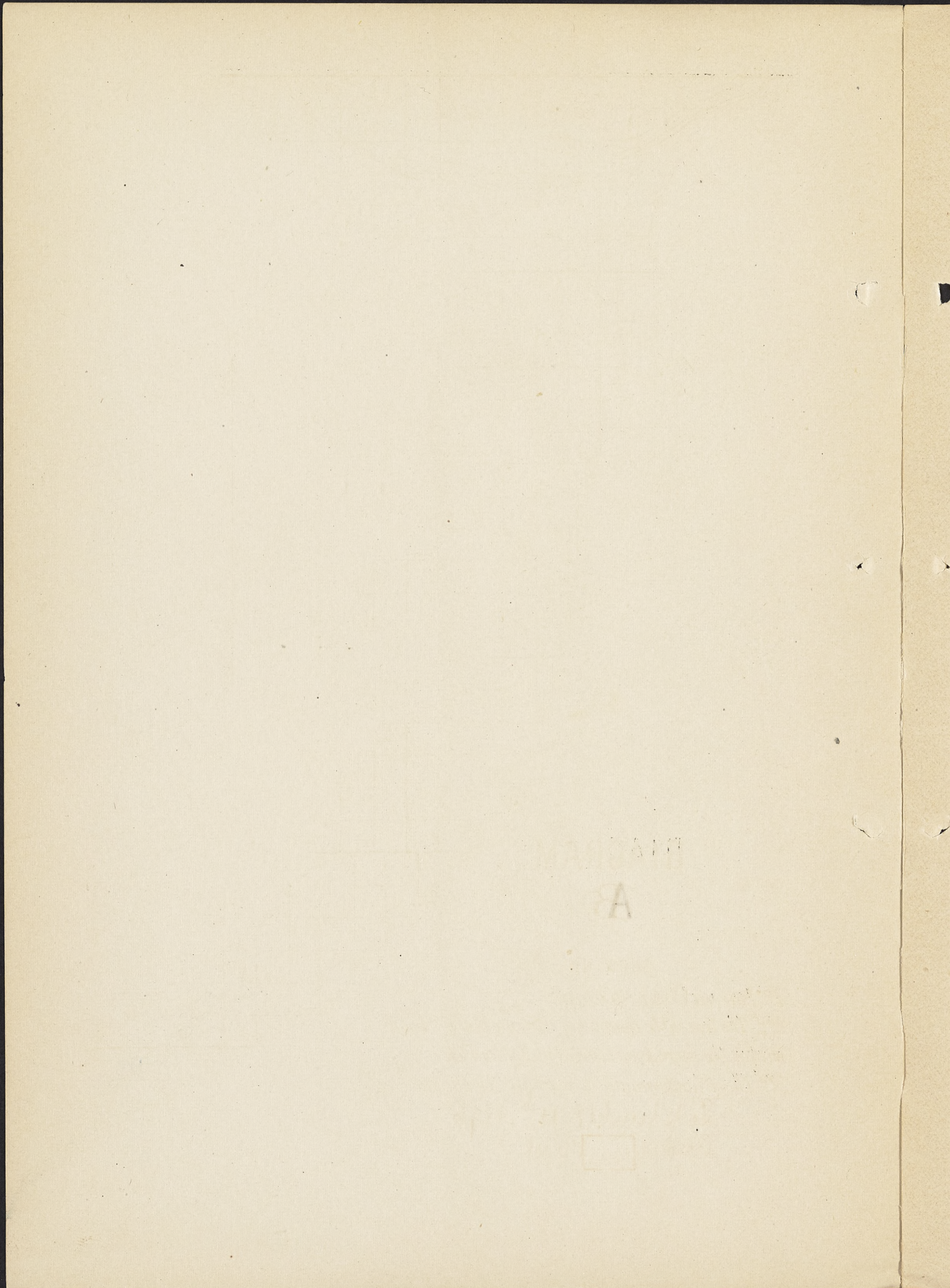
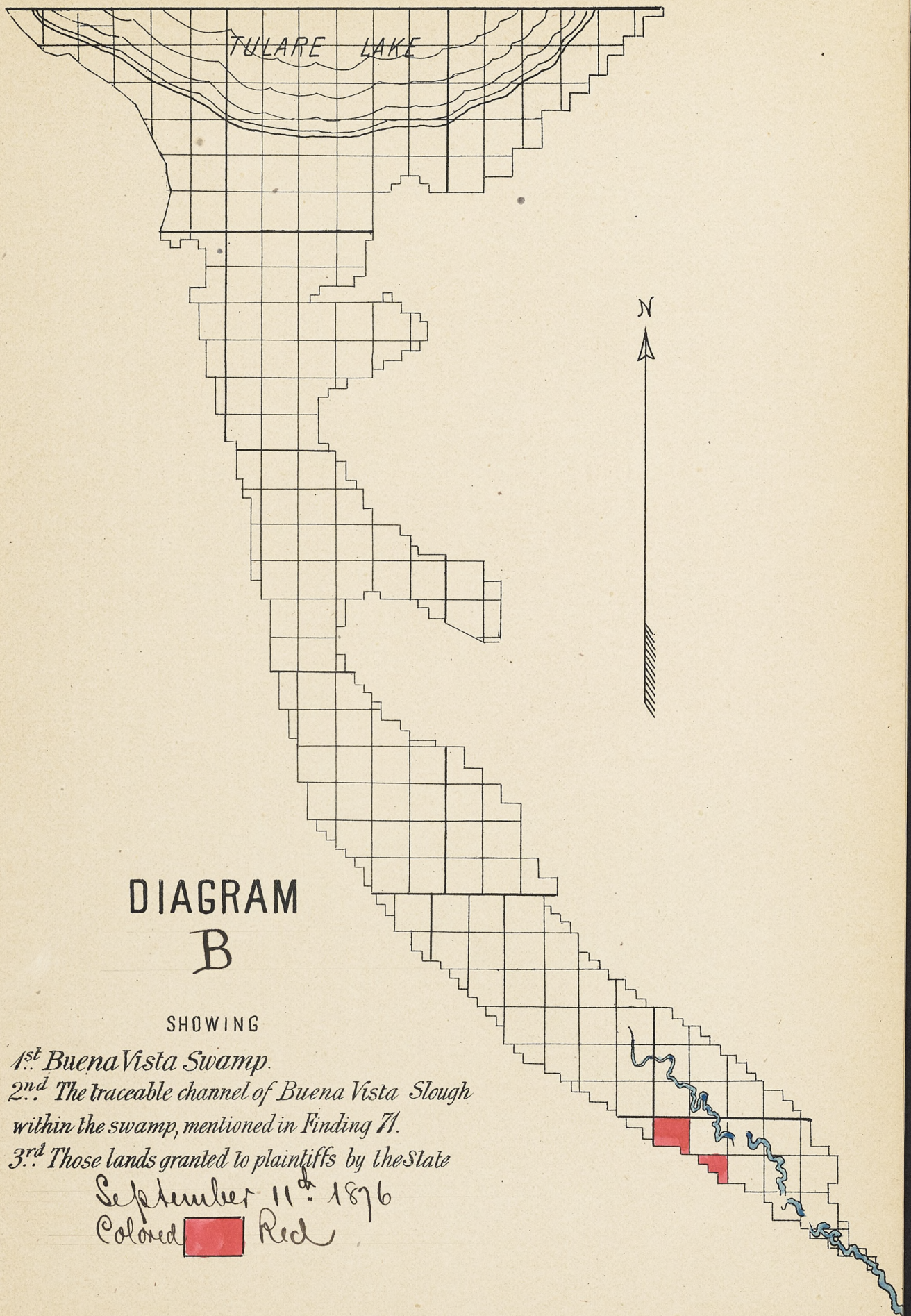


DIAGRAM A

SHOWING

- 1st Buena Vista Swamp.
 - 2nd The traceable channel of Buena Vista Slough within the swamp, mentioned in Finding 71.
 - 3rd Those lands granted to plaintiffs by the State Jan. 18th 1876 and Feb. 17th 1876
- Colored Pink

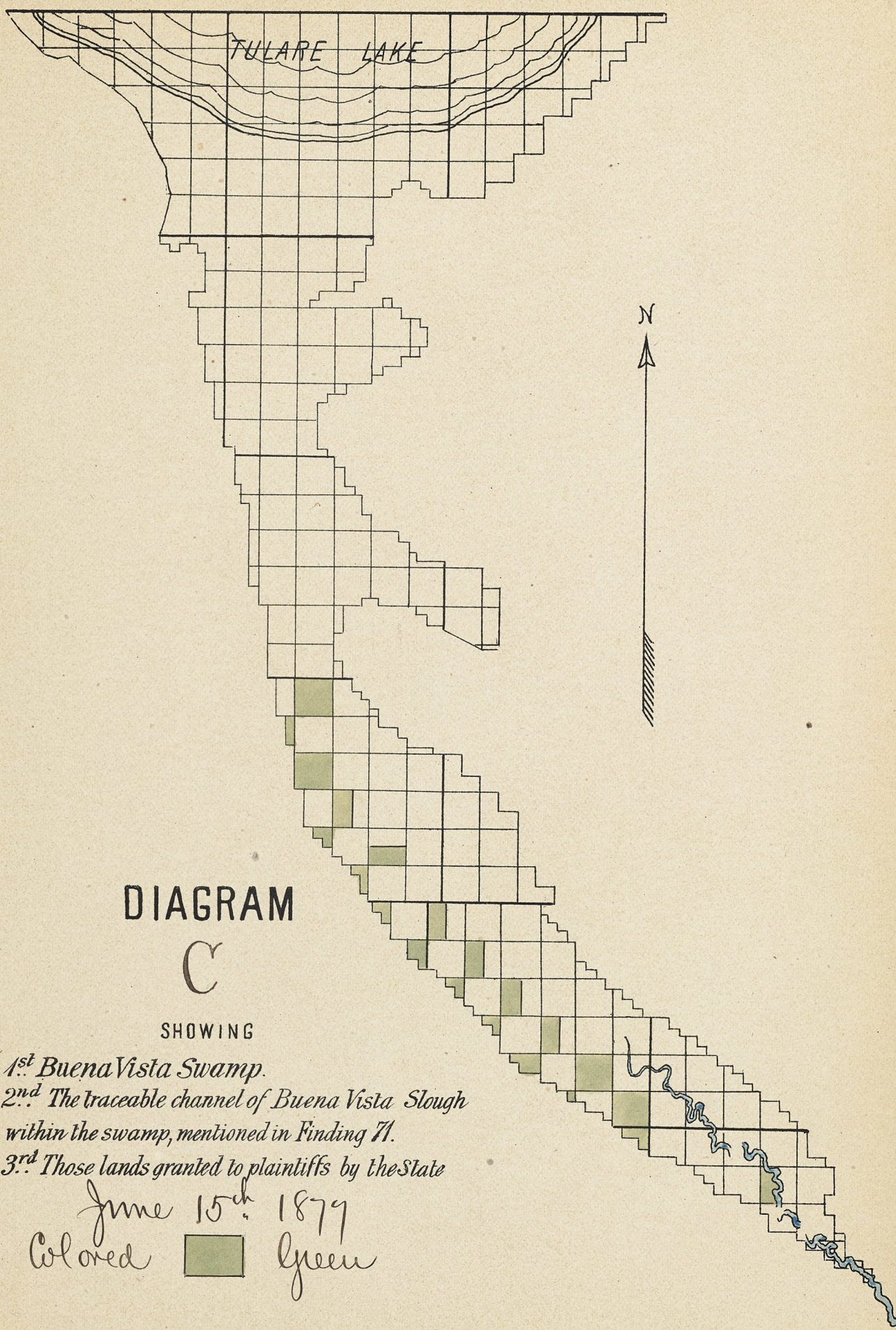






DATE 10/10/10

10/10/10



DIAGRAM

C

SHOWING

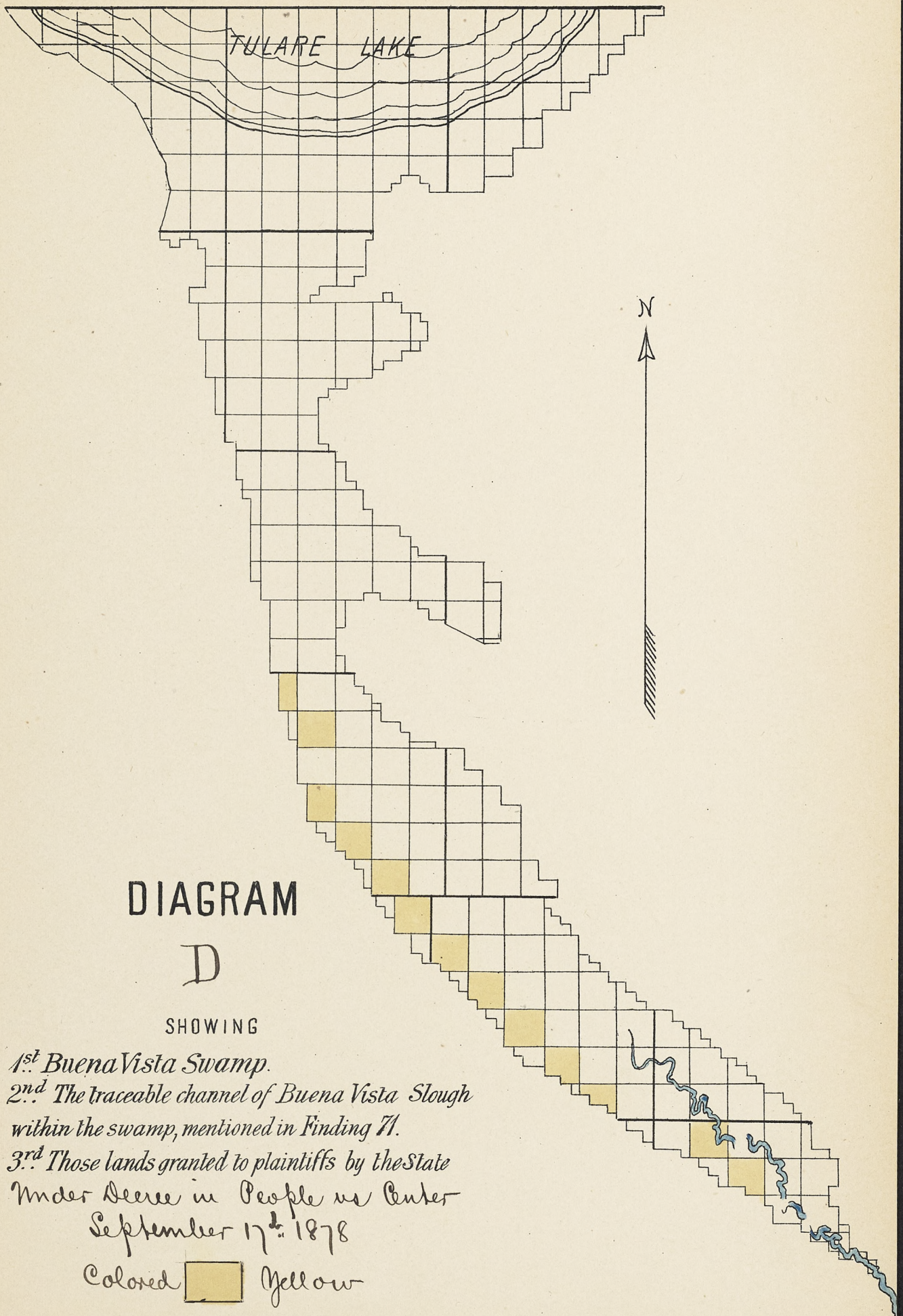
- 1st Buena Vista Swamp.
- 2nd The traceable channel of Buena Vista Slough within the swamp, mentioned in Finding 71.
- 3rd Those lands granted to plaintiffs by the State

June 15th 1879
Colored Green



1900





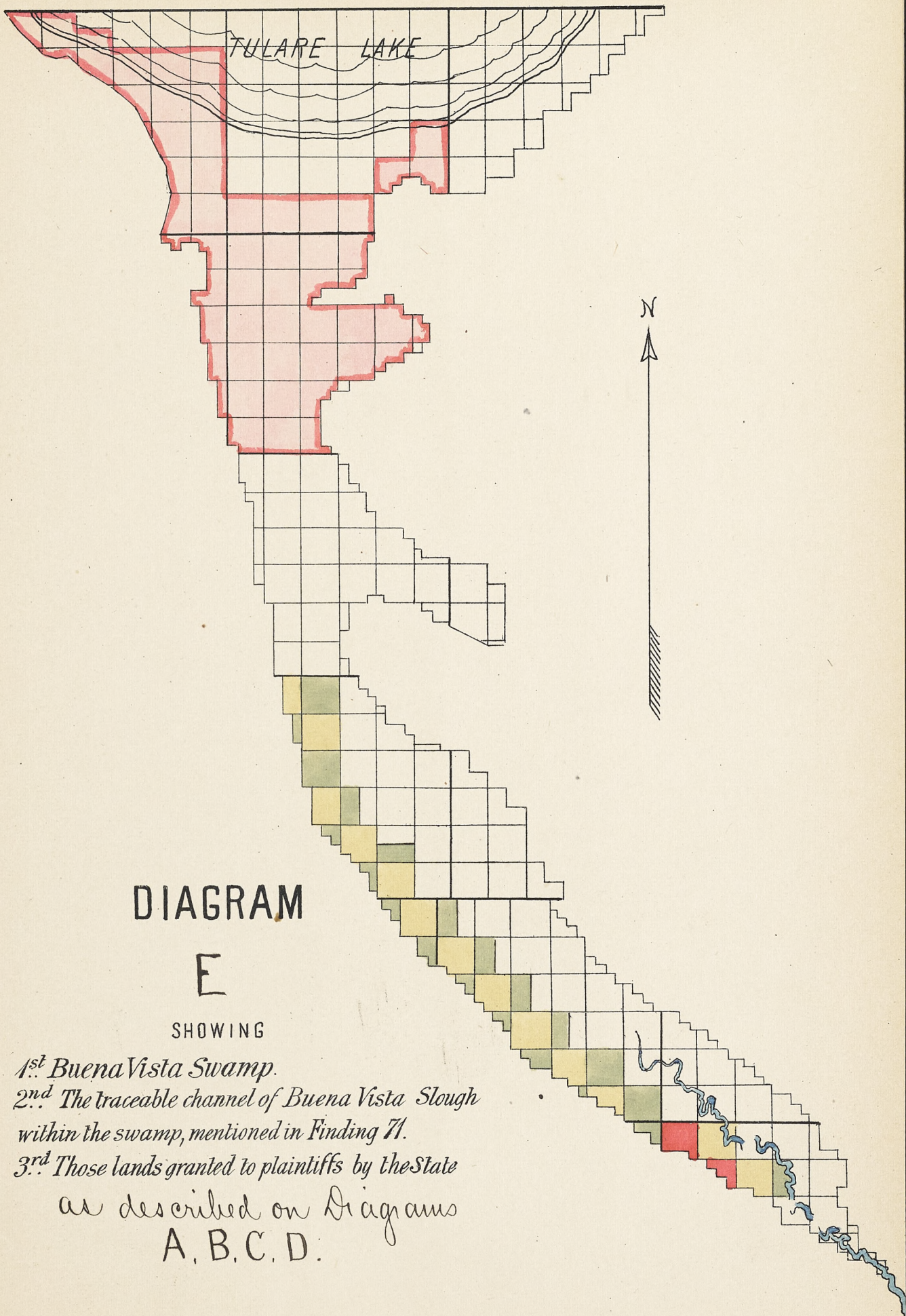


Diagram

E

1. 1000
2. 1000
3. 1000
4. 1000
5. 1000

1000





MADE IN U.S.A.

MADE IN U.S.A.
MADE IN U.S.A.
MADE IN U.S.A.
MADE IN U.S.A.
MADE IN U.S.A.

THE EVIDENCE SUPPORTS THE FINDINGS.

We deem it unnecessary to swell these pages with references to the evidence in support of those findings and portions of findings to which appellants make no objection; and in answering their Specifications of Insufficiency, we shall confine ourselves to pointing out, not all the evidence tending to prove each particular fact, but sufficient, merely, to support the finding thereon.

1.

In their 1st and 2d Specifications of Insufficiency, plaintiffs object to the following portion of Finding 2:

*"The lands described in the patents mentioned in Finding No. 1 were, until granted by the State of California, as set forth in said finding, the property of said State, * * * and plaintiffs had not, prior to the issuance of said patents, any right, title, interest, claim, demand, or possession, legal or equitable, of, in or to said lands, or any part thereof. And the lands mentioned in said Finding No. 1, as having, in the case of People vs. Center et al., been adjudged and decreed to these plaintiffs, were, until the filing of the decree in the said case of People vs. Center, the property of the State of California, and said State was the owner thereof, and plaintiffs had not, prior to the filing of said decree, any right, title, interest, claim, demand or possession, legal or equitable, of, in or to said lands, or any portion thereof;"*

and contend that, prior to the issuance of said patents, they had an interest in and claim to the lands described in said patents; that the State of California held the same in trust for them, and that, at the times said pat-

ents were issued, they were, and long prior thereto had been, in the actual possession of said lands and of every part thereof. They also contend that, prior to the entry of the decree in *People vs. Center*, they had an interest and claim in and to the lands therein described, and were, at the time of the entry of said decree, and, for a long time prior thereto, had been in the actual possession of said lands.

In their 64th Specification (objecting to Finding 80), they contend that ever since the year 1869 they have been in possession of all the lands described in the amended complaint.

Plaintiffs' Title.

In their amended complaint, plaintiffs allege "that said lands belonged to the State of California until the year 1876, and later, in which year, and at various times afterwards, they were granted by the State to plaintiffs or their grantors." (Trans. I, fol. 88.)

There is not a scintilla of evidence tending to show any title, legal or equitable, in plaintiffs to any of said lands prior to the issuance of the patents in the one case, or to the filing of the decree in the other; nor did plaintiffs make out or establish any interest in or claim to any of said lands at any time prior thereto.

As to those lands described in the decree in *People vs. Center*, the judgment itself (filed September 17th, 1878), declares that these plaintiffs, Miller, Lux and Crocker, have not any right, title or interest in or to said lands (Trans. II, fol. 98); and the Act of March 20, 1878 (Stat. 1867-8, page 358), pursuant to which said decree was rendered, provides that, upon the rendition of a judgment in said action awarding any of the lands in said Act referred to, to any party defendant, "a patent shall be issued * * * to such person for such lands, and the title of the State of California to said lands shall vest

"in the said person, his heirs and assigns, *as of the date of said judgment.*" Thus the very Act which authorized the decreeing of these lands to plaintiffs, fixed the date upon which their title should vest, and precluded the possibility of any retroactive effect of such title.

Plaintiffs introduced a certain deed (Trans. II, fols. 75 to 89) from Thomas Baker, Julius Chester, H. P. Livermore and John H. Redington, purporting to convey to Henry Miller and Charles Lux what counsel will doubtless argue were portions of the lands described in Finding 1; but it nowhere appears that the grantors named in said deed had any right, title, interest, possession, claim or demand of, in or to the lands they pretended to convey; nor does it appear that the lands intended were ever ascertained, or were even ascertainable. The deed itself describes nothing; gives neither courses and distances, nor metes and bounds, but refers merely to "the official plats of the U. S. Government Survey"—surveys which had never been made, and plats which did not exist.

We are unable to discover upon what ground plaintiffs contend that prior to the issuance of the patents, the State held any of these lands in trust for plaintiffs.

Plaintiffs' Possession.

Plaintiffs proved no possession prior to their acquisitions of title set forth in Finding No. 1. They attempted, however, to establish a possession dating as far back as 1869, or earlier, but the attempt was a failure.

J. C. CROCKER (one of the plaintiffs) says:

"In February, 1869, I came to see the ranch, where I am still located in business. I bought it at that time. I refer to the Templor, not this property. That is about fifteen miles west from Buena Vista Slough, in the foot-hills. About March I commenced gather-

"ing my cattle. I gathered them at about where the
 "Headquarter Camp is, now Wible's Camp." (Trans.
 II, fols. 485-6).

Now Wible's Camp, or Headquarter Camp, is not on
 plaintiff's lands, but some distance south thereof; it is
 in the extreme south-east corner of sec. 15, T. 30 S., R.
 24 E.

Crocker continues:

"I have been on the slough from that time to
 "the present time. I was continually working after
 "that time, off and on. We generally ranged our cat-
 "tle from Buena Vista Lake to Tulare Lake; some scat-
 "tering cattle even further north and further south
 "than that. That was where we calculated to keep
 "those cattle—within those bounds." (Trans. II, fols.
 488-9.) "In working in that swamp with our cattle,
 "from the year 1869 to the year 1876, we were all
 "through the swamp. I think I have been on every
 "acre in that swamp, from one end to the other. In
 "handling our cattle there, we would cross from one side
 "to the other." (Trans. II, fol. 494.)

Again:

"Q. Do you know where the lines of that swamp
 "and overflowed land, within that territory, run?"
 (That is the territory shown on plaintiffs' Diagram
 3, being the swamp land, in Townships 25, 26 and 27).
 "A. Portions of it. I did not survey it. I know only
 "by stakes which I have seen down through, on the
 "margin of the swamp, and through the swamp" (Trans.
 II, fol. 497).

Speaking of the sloughs through plaintiffs' lands, in
 the extreme northern part of the swamp, Crocker is
 asked:

"Q. How is that as to the township below, that is
 "25 S. 22 E.? Did they run through the section that
 "you have on the south line of that township?

"A. They run through the sections. They run through this portion here. I know I helped to run those lines around this portion of the land here. I ran up, I think, about—I would not be positive—I think we run to this township line.

"Q. Do you know that slough — Buena Vista Slough—runs through the swamp that you owned, or that the plaintiffs in this case owned in Township 25 S. 21 E.?

"A. Yes, sir; I know it runs through our lands there. I run through the swamp, and I suppose I have always seen the stakes there that was laid off as our land.

"Q. Do you know where the limits of your swamp and overflowed lands are on the east and west?

"A. Yes, sir. I know the swamp land. I have seen the corners at different points, but have never traced them out.

"Q. How is that as to the sloughs represented on this map, No. 2? Do you recognize these?

"A. Yes, sir.

"Q. Have you ever been on Buena Vista Slough from where it leaves the lake to where it divides at the point, going around Weed Island?

"A. I have.

"Q. And then followed it down as far as the range line, between 27 and 28?

"A. Yes, sir.

"Q. Do you know whether that slough runs through the lands belonging to plaintiffs, that is described in this complaint?

"A. Yes, sir; I have seen portions of that land run off, and I know where it is." Trans. II., fols. 599 to 502).

The substance of this testimony is that as to plaintiffs' lands in T. 25 S., R. 21 E. Crocker merely *supposes* that he has seen stakes there that were laid off his land; and as to those lands of plaintiffs' shown on Map 2, he has only seen portions of them "run off," and knows

where it is. Evidently "portions" that were "run off" by McCray in 1877 and 1878; for had it ever been surveyed before that date, plaintiffs would certainly have proved such fact.

Fol. 558, Crocker says:

"No one pumped water in Buena Vista Slough in 1871, according to my recollection. I think I am pretty positive about that."

Afterwards, however, he says: "I would like to correct a statement I made; at least, have time to reflect on it. I am not positive, but I think we did pump in 1871."

Fol. 569, he says that in 1871 the water ran a couple of months. "After that there was no water in the slough in 1871; only what was pumped." * * * Crocker had previously stated that the first time they put up pumps was in 1876 (fol. 510). He had also stated positively, on direct examination, that in 1871 the slough was full of water; there was a great deal of water in it.

"Q. Was it running all the time?"

"A. In 1871, oh, yes, sir.

"Q. In 1871?"

"A. Yes, sir; it was full of water.

"Q. What was the condition of that slough as regards there being running water down there, down to the year 1876?"

"A. There was water there constantly until the year 1876.

"Q. All the time?"

"A. Yes, sir; I never saw it without water running there" (fols. 490-491).

"Q. When was the first time you saw that slough without any water in it?"

"A. In 1876 and 1877" (fol. 507).

Again, at a subsequent period in his testimony, he says that in 1871 there was a big stream of water running in the swamp; that he swam the channel in three different places to get on to Weed Island (fols. 609-610).

"Q. Now, along there in the spring of 1871, you saw these three streams running with that amount of water, all full?

"A. Yes, sir.

"Q. How long did that water continue to run in that year, in that way?

"A. It ran in that way until the—along in the latter part of the season. It stayed all during the season.

"Q. What do you mean by a whole season?

"A. The whole year.

"Q. The whole year?

"A. Yes, sir.

"Q. Are you positive about that?

"A. I think so.

"Q. Did you see that in 1871—that state of affairs?

"A. Yes, sir.

"Q. Take your time to think, and see if you are sure about that?

"A. I think I am. We had to swim our horses across.

"Q. Was it the same thing in 1872?

"A. Yes, sir.

"Q. And 1873? The same appearance there in 1873?

"A. Yes, sir; as near as I can recollect" (fols. 612-14).

F. A. TRACY (for plaintiffs), speaking of 1871 being a dry year, says: "I think the water was scarce enough that year to require pumps. I think Mr. Crocker had pumps at that time" (Trans. II fol. 996).

J. M. LEWIS (for plaintiffs) says in 1871 he came to this country, hunting employment; came in March; went to the slough.

"Q. Was there any pumping done there in 1871?

"A. There was some. I was there for a week, perhaps, on the slough, along in April or May, from the Staten Corral to the Adole Holes. Saw no water

"there. I *suppose* they were pumping water. I had
 "nothing to do that year with the cattle in the tules"
 (Trans. II, fols. 1064-1065).

Again: CROCKER is asked by Mr. Houghton:

"Q. You have spoken of the fact that there was a
 "dry season when you pumped there in the year 1870
 "or 1871. Can you fix the year? I have not the testi-
 "mony before me. There was a dry season you testi-
 "fied to, I understood you, in answer to a question Mr.
 "Garber asked you, either in 1870 or 1871.

"A. In 1871.

"Q. How do you know that was the year 1871?

"A. We had to pump, and other things in connec-
 "tion with it that I know of.

"Q. Well, what other things?

"A. Well, there is one circumstance that I know of.
 "We bought the land there in 1870, and immediately
 "after that I rigged up the pump and we went to pump-
 "ing.

"Q. Then it was after you bought the land and went
 "into possession—the year after you bought the land
 "and went into possession—that there was that short
 "season of water?

"A. Yes, sir; 1871.

"Q. You speak of buying the land. For whom was
 "that purchase made? Was that purchase made the
 "year previous to that dry season?

"Mr. Garber—One moment. The deed will be the
 "best evidence.

"The Witness—I think the purchase was made—

"Mr. Garber—One moment. I object. The deed is
 "the best evidence.

"Mr. Houghton—The deed is in evidence. I want
 "to fix the time the purchase was made.

"Mr. Garber—The deed will show what year it was.

"Mr. Houghton—It won't show, because he made
 "several purchases.

"Mr. McAllister—There was one deed in 1872.

"Mr. Garber—And one in 1877.

"Mr. Houghton—Q. Mr. Crocker, you said that
"there was one circumstance in connection with the
"purchase of the land that enabled you to fix the year
"1871. I will ask you what purchase that was, and
"who from?

"A. Will you allow me to look at the deed?

"Mr. Flourney—We object to that.

"Mr. Houghton—I will repeat that question without
"offering the deed.

"The Witness—I have to take this entirely from
"memory. I am not prepared to answer the question
"until I can refer to dates." (Question again read by
the reporter.) "That was what I wish to refresh my
"memory about. I know there were several pur-
"chases." (Trans. II, fols. 714 to 718.)

Now it is patent that, when asked "Then it was after
"you bought the land and went into possession—the
"year after you bought the land and went into posses-
"sion—that there was that short season of water?" Mr.
Crocker's answer, "Yes, sir; 1871," was simply in re-
sponse to "When was the dry year?" His answer
was not intended as responsive to that portion of
the question relative to possession; he had not that
in contemplation; he was asked as to a dry year,
and fixed it "in 1871." But should it be insisted that
he meant to state that he went into possession in 1870,
we then submit that such testimony proves nothing. It is
too vague, does not specify the particular lands entered
upon, nor does it show an entry under claim of title.
A mere naked possession, even if proved, can avail
plaintiffs nothing against the rights of defendant ac-
quired from the State.

After having closed their case, plaintiffs, by permis-
sion of the Court, recalling Crocker, asked:

"Q. When did you commence pasturing your cattle
"upon the land described in the amended complaint?

"A. In 1870. (Trans. II, fol. 2383.)

Crocker also added: "At the time we bought the "land and came in possession of it." But this portion of his answer not being responsive to the question asked, nor within the permission given, was afterwards ordered stricken out. (Trans. III, pp. 33-34.) We call attention to such fact lest, in the vast amount of matter presented by the Transcripts in these cases, it might escape your Honors' notice.

F. M. EPPERLY (for plaintiffs) says:

"In 1871 I settled at Dover's Camp—where Dover's Camp is; I don't know what section that is on; as far "as the sections are concerned, I know nothing about "the sections, but I think it was Section 1. My business was caring for hogs at that time; I owned hogs; "I owned no land there; I got land of Mr. Crocker "there; rented it from him. I came there in May, 1871, "and left there in May, 1876. The range of my hogs "was from the lower end of Weed Island, down to about "five or six miles below the Dover Camp, making a "distance, I should think, of about nine miles—eight or "nine miles in length, the range that my hogs ran over; "might be more; might be less; I couldn't say.

"Q. How much land did you rent from Mr. Crocker?

"A. I rented with the privilege of running hogs in "there; no particular lands specified at all; I could not "tell exactly how much I paid him for it; I never paid "him anything in money; what I did pay him was in "work; a portion of the work he paid me for, and a "portion he did not; it was understood that I should "look out for stock there; when I saw any in distress—"bogged down, or anything of that kind—I relieved "them; that was understood with Mr. Crocker when I "went there, that I should do that for the privilege of "running my hogs there." (Trans. II, fols. 2253 to 2255.)

Dover's Camp, referred to by Mr. Epperly, was on Sec. 1, T. 29 S., R. 22 E. (Trans. II, fol. 670). This was one

of the sections acquired by plaintiffs under the decree in *People vs. Center* (Trans. II, fol. 105), in and to which, as we have shown above, plaintiffs had no right, title or interest whatever prior to September 17th, 1878—to which, in fact, they did not even attempt to show color of title prior to that date. Now, located on a tract of land in which plaintiffs had no interest whatever, what were the lands which this hog-man rented from Mr. Crocker? *No particular land specified at all.* It does not even appear that the lands rented were on the west side of the swamp—the side upon which are situated the lands now owned by plaintiffs.

Such is the evidence, and substantially all of the evidence which can possibly be adduced, in support of plaintiffs' claim of possession. Yet it proves nothing.

Assuming, however, that a presumption of possession might be drawn from the foregoing testimony, such possession was by no means exclusive; for there were many others besides plaintiffs who were pasturing their cattle and hogs, as well upon those lands claimed by plaintiff as upon the balance of the lands in Buena Vista Swamp, and whose possession was similar and in all respects equal to that of plaintiffs.

CROCKER is asked, relative to pumping in 1876:

“Q. Did the plaintiffs, Miller, Lux and Crocker, put up those pumps?”

“A. Yes, sir; we put up a part of them, and the firm of Cox & Clarke put up a part of them.

“Q. For your own cattle, I mean, or were you running your cattle together?”

“A. We were running them together.” (Trans. II, fols. 512-513.)

Again, Crocker says that, on the swamp lands along Buena Vista Slough, during the years 1872, '73, '74 and '75, there were from 25,000 to 35,000 head of cattle belonging to different parties (Trans. II, fols. 719-720). Yet during those same years plaintiffs themselves had only

about 1,200 head of cattle on the swamp; for, says Crocker: "When I first went there in 1869, we estimated to have about 1,200 head of cattle. During the years 1873, '74 and '75, I suppose we had about the same number as we had previously; but in 1876" (after plaintiffs had acquired some of their lands, and could enjoy the exclusive possession thereof) "we might have had 10,000 or might have had 15,000 cattle." (Trans. II, fols. 492-493.)

F. A. TRACY (for plaintiffs) says that in 1864, '65 and '66, he (Tracy) was down with his stock along the slough, crossing it from time to time (Trans. II, fol. 925). In 1867-68 he was still ranging his stock along the slough; on both sides; all the distance between Buena Vista and Tulare Lakes; was crossing to and fro in 1867-68, and during 1869 was all along on both sides with his stock (Trans. II, fol. 930). He had his stock still there in 1872; in 1872, '73, '74 and '75, was still running his stock along the slough, the same as he had been doing in the years previous (Trans. II, fol. 939).

Tracy says that during the year 1875 there were from 30,000 to 40,000 head of cattle on the lands along the slough (Trans. II, fol. 1020).

R. B. STILL (for plaintiffs), in 1874, was working with cattle for Cox & Clark, along the west side of the slough, from about ten miles north of Tulare Lake to within about eight miles of Buena Vista Lake (Trans. II, fol. 758); and in 1875, during the whole year, until August, was working with cattle and branding calves, camping in various places along the west side of the slough, between Buena Vista and Tulare Lakes (Trans. II, fol. 762).

THOMAS L. BRIGGS (for plaintiffs) drove cattle to the slough in 1864; was there in 1866, getting up cattle; in 1874 was there again, gathering scattering cattle; was along the whole length of the slough, from Tulare to

Buena Vista Lake; in gathering cattle, would cross from the outside slough to the islands (Trans. II, fols. 1091 to 1094); was also there in 1875, getting up cattle (fol. 1097), working in the swamp all the time (fol. 1099).

G. W. CLARKE (for plaintiffs) had cattle along the slough in 1865 (Trans. II, fol. 1146); worked all over the slough, from Tulare Lake to Tracy's Crossing (fol. 1147); in 1869 was up and down the slough, on the west side, working with cattle (fol. 1154); was there again in 1874, gathering cattle (fol. 1159).

T. W. BARNES (for plaintiffs) was on the slough in 1869, working back and forth with his cattle and hogs; also in 1870 and '71 (Trans. II, fol. 1330).

W. McFARLAND (for defendant) says that in 1872 Crocker was living at the Templor Ranch; also in 1875; that that was Crockers' headquarters at that time (Trans. IV, fol. 1471).

J. P. MURRAY (for defendant) has been in the stock business since 1852; had cattle ranging all over the island, and around Kern and Buena Vista Lakes; brought cattle there first in 1864; about 1,000 or 1,200 head (Trans. IV, fols. 1496-7); drove his cattle to the head of Tulare Lake, and worked all the way up through Buena Vista Swamp (fol. 1498).

Says he: "The first time I knew Mr. Crocker having any cattle in this country was in 1869 or 1870; I met his men through there, and I knew his cattle; they were working all through the country here. Crocker had cattle all over the country. I have seen his men all over Tulare County, going up to Fort Tejon and Santa Maria, attending all the rodeos, Linn's Valley, Poso Creek, up Kern River, on Tule River and north of Tule River." (Fols. 1502-3.)

Murray says that during the year 1869 everybody had

cattle there (folio 1503). "During the years 1869, '70 and '71 there were probably 40,000 or 50,000 cattle there, or more. Pat Murphy had cattle there; Mr. Jones, I think; Crocker had cattle there; and Miller & Lux, and Cox & Clarke, and Lynch & Fowler, and Blackenship, Bacon, and one or two or three of his boys. In 1870 I could have sold my cattle there for 2,500 cattle. I was there also in 1871; worked all through there in the fall, spring and summer" (fol. 1505). "I continued to keep my stock there in that swamp until 1877; was along up there every year until that time, and the same condition of affairs existed with regard to cattle as had existed before" (fol. 1535). "In 1877 Mr. Lynch and I had 10,000 cattle; Miller & Lux talked about buying them for 12,000 head" (fol. 1537).

As to pumping in 1871, Murray says:

"I was a good deal through that swamp in the year 1871. I spent a good deal of my time there that year.

"Q.—How is it as to the amount of care that cattle require in a dry year compared with a wet year?

"A.—You had to rush around there to find feed and water to save them. In 1871 I was driving cattle, picking them out of places where they were not doing very well, and driving them there, where they would do well; driving them up in this country, on the island. I think I was all over this swamp land district during that year. I had to go over it, to try and find my cattle. I didn't want to lose my calves. There were other cattle men in there, and I wanted to keep even with them." (Trans. IV., fol. 1507-8.) "In 1871 I worked all through there with my cattle, in the fall, spring and summer. I don't think there were any pumps down there on the country between Tulare and Buena Vista Lakes in that year; I saw none there; if there had been any, I should have seen them." (Fols. 1505-6.)

And as to stakes in the swamp, he says :

"In 1864 I don't think there was a section there that I did not go over. I saw no stakes there; nothing to mark the sections. I was not looking for stakes; I did not see any." (Fols. 1499-1500.) "In 1869 I was all over the country a great portion of the year; that was my business; I had nothing else to do; I was there in spring, summer and fall; I saw no stakes there that year to mark the boundaries." (Trans. IV., fol. 1504.)

Your Honors will take notice, that under the Acts of Congress and the Regulations of the Department relative to public surveys, the Government of the United States made no surveys within what are termed the Swamp and Overflowed Lands. However, on this subject we have direct testimony that no such surveys were ever made within Buena Vista Swamp.

CHARLES D. GIBBS (for plaintiffs) was Deputy U. S. Surveyor under Mr. Hayes, from 1853 to 1854 (Trans. II, fol. 1382), and as such, assisted in making the only surveys in the valley portion of what is now Kern county, from which any Government plats were made. "In 1854," says he, "I surveyed between the Sixth and Seventh Standard lines. I surveyed the following townships:

"Township 25 S., Ranges 17, 18, 19, 20, 21, 22, 23, 24 and 25 E.; Township 26 S., Ranges 17, 18, 19, 20, 21, 22, 23, 24 and 25 E.; Township 27 S., Ranges 19, 20, 21, 22, 23 and 24 E.; Township 28 S., Ranges 19, 20, 21, 22, 23 and 24 E." (Trans. II, fol. 1383). That is, he surveyed the Government lands within those townships; for, says he:

"I run none of the section lines or meander lines through the swamp land. I established the township lines and meander corners to the swamp" (Trans. II, fols. 1439-40). "The swamp land we had nothing to do with; we stopped on the borders of the swamp land" (fol. 1441).

"Q. You didn't enter into the body of swamp lands
"at all?

"A. No. Our instructions were to stop always on
"the margin of the swamp land" (fol. 1445).

Plaintiffs offered a certain diagram marked "Exhibit 6" (Trans. II, fol. 1416), which Gibbs says he made from certain township plats which Mr. Houghton handed him (fol. 1404), and expressed on it all that is expressed on the thirteen plats, *and more besides* (fol. 1413). On his direct examination, he is asked:

"Q. I understand that you prepared this Map 6
"from certified copies, which are in evidence, and where
"anything in that appears outside of these thirteen is
"from the records on file in the U. S. Surveyor-Gener-
"al's Office?

"A. Partly from that, and partly from other maps of
"Buena Vista Lake. I just extended it around by other
"surveys.

"Q. What surveys?

"A. Shown by the Government surveys; but I did
"not go to the Office to get them. I had them in my
"room" (fol. 1449).

Now this "Exhibit 6" shows the section lines drawn through Buena Vista Swamp. We hardly think it possible that plaintiffs will attempt to argue from the fact that "Exhibit 6" shows section lines through the swamp, that the swamp was actually surveyed; but, lest they should, let us see how those lines happened to be put on "Exhibit 6." Gibbs being recalled by defendant for the very purpose of showing that the section lines within the swamp on "Exhibit 6" have no business there, is asked:

"Q.—In your former examination you stated that
"some portions of this map, Map No. 6, were made from
"certain township plats furnished you by Mr. Houghton,
"and that other portions were made from other data;
"that some portions were made from your surveys. Will
"you designate to me, if you please, what portions of

"this Map, No. 6, were made from the township plats
furnished you by Mr. Houghton?

"A.—I don't know that I can remember all the numbers of the thirteen townships. * * *

"Q.—What did you make the balance of this Map No. 6 from?

"A.—The portion around Goose Lake I made from my surveys.

"Q.—Have you your notes?

"A.—Yes, sir. I ran the township line; these are subdivided by another surveyor.

"Q.—You mean Townships 27 and 28, Ranges 22 and 23?

"A.—I made that portion on that side; on the west side of the swamp; I made a portion of 27 and 28 south, Range 22 east, from my surveys on the west side of the swamp lands.

"Q.—From surveys on the west side?

"A.—On the west side. This other side, on the east, I only ran the township lines, and it was subdivided by another surveyor.

"Q.—How did you make this portion of the swamp land itself, Township 27 and 28, range 22?

"A.—That had nothing to do with the interior, according to my survey; you will find that in Government plats, we just meander the exterior of it to the body of the tule land.

"Q.—You didn't make the interior of this body of swamp land from your survey?

"A.—No, sir; you will see it is marked, because that is a printed plat and we were in a hurry with the work; we just took those printed sheets.

"Q.—You mean that the section lines in the body of the swamp land are simply marked on the printed plats?

"A.—Yes, sir; on these printed sheets; all I did was to take them and fill up to save me the trouble of numbering these sections.

"Q. Outside of the swamp land, you mean?

"A. Yes, sir; the interior has nothing to do with it; *"the interior I didn't take from the Government plat;*
 "they are only shown here because they happen to be
 "in these printed sheets; that is all.

"Q. That is, in this whole body of swamp land that
 "you have mentioned here, that is marked on this map
 "here 'Tule Land,' on Buena Vista Slough, that refers
 "to this whole body of swamp land?

"A. Yes, sir."

And on cross-examination by Mr. Houghton:

"Q. I understand you to say that, as far as the sec-
 "tionizing is concerned, or section lines within that plat
 "of swamp and overflowed land, you had nothing to do
 "with running them, nor were they platted from any
 "survey of your own?

"A. Not in the interior of the swamp; you know we
 "only ran up to the swamp and meandered. *That is*
"the State line, and the Government had nothing to do
"with that" (Trans IV, fols. 1626 to 1632).

F. P. McCRAY, one of plaintiffs' witnesses, having
 previously testified that in 1877 and '78 he sectionized
 portions of Buena Vista Swamp, being recalled by de-
 fendant for the purpose of showing that it is impossible
 to subdivide the swamp by merely continuing or extend-
 ing through the swamp the lines established by the Gov-
 ernment on the east or on the west side, is asked:

"Q. I understood you to say that, in making this
 "map, you found some Government posts outside of the
 "swamp land, and surveyed from them, and again con-
 "nected with the Government posts?

"A. What portion of the swamp land do you refer
 "to?

"Q. Some portion on this that you referred to, Map
 "No. 3, either one of these two maps, Map 2 or Map 3.

"A. Well, the lower map, No. 2, was subdivided by
 "myself.

"Q. I understood you to say that, in finding your

“starting point, you found Government posts and charcoal outside of the swamp, and connected from that to make your survey?”

“A. There are two surveys in there—one that was subdivided by myself regularly, and the other was meandered. * * * At the time of the subdivision I connected with the Government corners at all points where there were any connections to be made; then the exterior boundaries were established from the Government corners. The others I also connected with Government corners, part of them. I connected with Government corners in making both surveys; the Government corners that I connected with were on both the east and west sides of the swamp.

“Q.—Now, what I want to ask you is, whether any one taking those Government stakes, both on the east and on the west of the swamp, it is possible to connect them so as to make those section lines run through without any change or bending in the lines running across?”

“A.—Not at all places; no, sir.

“Q.—Then, in that respect, this map is not and does not pretend to be correct, I suppose?”

“A.—In that upper map the connection is made from Government corners, and the slough is meandered.

“Q.—No; what I want to ask you is, that in respect to the lines running clear across, and being straight all the way across, an exact square, these maps are not and do not pretend to be correct?”

“A.—So far as the lines running straight, they simply show the sections and the sloughs through them.

“Q.—I am not speaking of the sloughs at all; I make no reference to the sloughs; simply to these section lines; I understood you to say, conformably with the Government surveys, the corners, the posts outside of the swamp, it is impossible that they could go across with entirely straight lines?”

“A.—I don't know how they are at all on that portion

"that you say; on that portion some of them run very
"nicely and very straight.

"Q.—None of them came through from the Govern-
"ment corners on the outside of the swamp, both east
"and west, without some bend or change of these lines?

"A.—That is from one point to another.

"Q.—Then, in that respect, this map is not correct, is
"it—does not pretend to be?

"A.—That does not show those bends, sir.

"Q.—As the sections are laid down here they go
"straight across, as if they connected with mathematical
"lines at right angles?

"A.—Yes, sir.

"Q.—That is not the fact, as I understand it.

"A.—Not in all cases.

"Q.—None of these lines were connected across in a
"perfectly straight line?

"A. When they get to the swamp line they may run
"straight across the swamp to the other point.

"Q.—But in connecting them with Government sur-
"veys, you could not take the Government surveys on
"the east and the Government surveys on the west, and
"have them connect, as represented on this map, with
"perfectly square lines, could you?

"A.—I don't think you could, at all points; there are
"some points in the southern portion you can.

"Q.—With the Government surveys running east and
"west, it would not connect exactly?

"A.—Government work does not connect exactly.

"Q.—I don't care about that. It would not connect
"as laid down on this map, exactly, would it?

"A.—No, sir; I don't know that it would; I have
"shown a map.

"Q.—(Interrupting).—I am not asking you about that.
"I only ask you if it is true that they would not connect
"as laid down?

"A.—Not in perfect squares; no sir." (Trans. IV,
fols. 1640 to 1648.)

And on cross-examination by Mr. Houghton :

“Q.—In running these lines across the swamp land, across the land which is represented upon map number 2, how much of an error did you make, or how far did you have to run other than straight to make the connection from east to west?

“A.—Well, I don’t know that I could answer that question as to how much it was. It has been some time ago.

“Q.—Was it a slight error—a slight difference, or a great difference?

“A.—Well, my memory is *there was a great difference in it.*” (Trans. IV, fol. 1649.)

2.

In their Specifications of Insufficiency, Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 26, 27, 33½, 35, 36, 37, 38, 50, 51, 54, 55, 56, 62 and 63, objecting to all or portions of Findings 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 30, 31, 40, 45, 46, 47, 48, 65, 66, 70, 71, 72, 78 and 79—relating more or less to Buena Vista Slough, and the flow of water to plaintiffs’ lands—plaintiffs contend, in substance, that Buena Vista Slough is a natural stream or water-course, through which the waters of Kern River, both before and after the flood of 1867–8, have been wont to flow through and along plaintiffs’ lands, to and into Tulare Lake; that the channel or channels of said slough are well defined and continuous, and carry within their banks the usual and accustomed flow of the waters of said river.

It would occasion too much repetition, and trespass too much upon your Honors’ patience, for us to answer seriatim each specific objection suggested by plaintiffs to these findings; whilst, by answering the substance of their objections, we not only support each fact found, but are enabled to treat the questions involved

in a more concise and logical manner. We will refer, however, more specifically to the several findings as occasion suggests.

Kern River Prior to the Flood of 1867-8.

There is but little dispute as to the course of the river prior to the flood of 1867-8, as described in Findings Nos. 6, 7 and 8. It is admitted on both sides that, up to the time of said flood, the natural, usual, accustomed and almost invariable flow of the waters of Kern River was to and into Kern and Buena Vista Lakes, however they may have gotten there or whatever may have become of them thereafter, the only controversy between the parties being: First, Whether or not it was usual and customary for these waters to flow out of the lakes through Buena Vista Slough (which we shall hereafter discuss under the heading "Buena Vista Slough"); and, Second, The immaterial objection suggested by plaintiffs to the fact stated in Finding 8, that:

"In the winter of 1861-2 a flood closed the South Fork at its head, and thenceforth, until the winter of 1867-8, the natural flow of the waters of Kern River was down to and through Old River."

SOL. FRIED (for plaintiffs) is asked:

"Q. What change did the flood of 1861-2 make in the running of the water in Kern River?"

"A. It changed it clear off, entirely away from where it ran before.

"Q. Did it leave a portion of the water still in the South Fork?"

"A. No, sir.

"Q. The flood of 1862?"

"A. January, 1862, I think it was, if I remember the month right. After the flood there was no water running down there. It turned the water all away,

“and we went up and turned it back, myself and others, and then it continued to run down through *the new channels*” (Trans. II, fols. 223-4).

On cross-examination, Fried states:

“The flood of 1861-2 closed up the South Fork, and shut off the water from running down that fork.

“Q. And you went up there with others and opened up the channel again?

“A. We opened *another channel*. The object was to get water down here for irrigating purposes, to irrigate on the south side of Bakersfield, and in several places along in there—places in the immediate vicinity of Bakersfield. We made a canal or ditch about six or seven feet wide and about two and a half or three feet deep. We used the water turned in there for irrigating, and when we did not do that we turned it out into different sloughs.

“Q. Was that ditch as large as the South Fork was before?

“A. No, sir. The ditch that we cut, up at the river, was probably eighteen feet wide, and we had to cut that down to near six feet, probably seven feet. When we got that dug, we had a current of water in it about three feet deep.

“Q. When the water left the Old South Fork dry in 1861-2, that winter, what course did the water take? What became of the water?

“A. It changed off on to the north side. I don’t know where it went to.” (Trans. II, fols. 227 to 230.)

The testimony of this witness is clear and positive that the flood of 1861-2 closed up the South Fork entirely, and that after said flood a new channel, some eighteen feet wide, was cut from the river, through which a stream three feet deep was artificially turned for irrigation purposes.

SOL. JEWETT (for plaintiffs) states that the flood of 1862 turned the river further to the north—the main channel; that after 1862 the main channel of the river

was what is now called Old River. (Trans. II, fol. 243.)

J. V. ROSEMEYRE (for plaintiffs) says that in 1863 there was no water along the South Fork (Trans. II, fol. 363). "In 1862 the waters changed from the South Fork. There was a flood that season. After that they ran through the channel known as Old River. Some water still ran after that in the Old South Fork—some 'little water' (fol. 364). Probably what was turned in by Fried and others.

P. A. STINE (for plaintiffs) says:

From 1862 to 1868 Old River carried nearly all the water; Goose Lake Slough would be full in the spring of the year until it began to go down, then the slough would fill up and all the water would come down Old River (Trans. V, fol. 405).

W. J. CANFIELD (for defendant):

"Old River was the main channel of Kern River until 1867 and 1868." (Trans. III, fol. 1683.)

Kern River after the Flood of 1867-8.

Plaintiffs make no objections to the description given in Findings 9, 10 and 11 of the course of the waters of Kern River after the flood of 1867-8 other than as to what becomes of the waters which flow down New River below the point in Sec. 23, T. 30 S., R. 25 E., where the "North or Middle Branch" diverges from the "South Branch." But lest they may hereafter claim that in their Fiftieth Specification of Insufficiency (objecting to Finding 65) they impliedly dispute the fact found in Findings 9 and 10, that "*from the flood of 1867-8 until the fall of 1877, one-half of the waters of Kern River, in their natural flow and at ordinary stages, passed down the channel of Old River,*" we refer your Honors to the testimony of several witnesses on that point.

Old River.

SOL. JEWETT (for plaintiffs):

"In the spring of 1868 New River was opened. After that, water continued to run in Old River. I should judge half of it ran in Old River from that time on." (Trans. II, fol. 253.)

E. D. CROSS (for defendant):

"Have known Old River since 1869" (Trans. III, fol. 462). "Crossed Old River frequently, from 1869 to 1876; also crossed New River very frequently. Have crossed New River and Old River about the same date; have crossed and recrossed both rivers the same day."

"Q. What is your judgment as to the relative quantity of water carried along during those years, up to 1876, before the last head-gate was put in Old River; as to the relative quantities of water carried by Old and New Rivers? From your observations, which carried the most?"

"A. From the first time I was there, until the head-gate was put in in 1876, I should think Old River would carry more water than New River. That was my impression from crossing both streams" (fols. 467-468).

THOMAS HOKE (for defendant) says:

"From 1870 to 1877 Old River would be quite high in the spring—always high in the spring. In the spring of 1877 the water in the river was low—not so high as usual. There has been very little water there since the spring of 1877."

"Q. Do you know any reason for that?"

"A. I presume it was on account of the head-gate being put in in Old River—at the head of Old River. Prior to the putting in of that head-gate there was always high water in the spring; since then there has

“not been. The Stine Canal Company put in that head-gate” (Trans. III, fols. 851-852).

J. R. WATSON (for defendant):

“Before the dam (*i. e.*, the Stine head-gate) was built, Old River carried about an equal proportion of water with New River” (Trans. III, fols. 1271-2).

J. NIEDERAUR (for defendant):

“Have lived in Kern county since December, 1869” (Trans. III, fol. 1302). “Have seen Old River ever since I have been here. I always thought that Old River carried more water than New River; it always looked to me as if the current was stronger. Up to the time the Old River head-gate was put in, the volume of water in Old River was about the same every year, as far as I could see. It has decreased since the head-gate was put in. The Stine head-gate is what I refer to. I cannot say when that was put in. I refer to the head-gate which was put in at the head of Old River itself, across the river” (fols. 1313-1314).

WALTER JAMES (for defendant):

“The fall of Old River from its head is approximately seven feet per mile. The fall of New River is from four to six feet per mile” (Trans. III, fol. 143).

S. H. ANDERSON (for defendant):

“Q. What is your opinion as to the relative amounts of water in Old River, compared with that in New River, in 1871, '72, '73 and '74?

“A. Well, Kern River was running from the melting of the snow in the spring, and the Old River carried the bulk or biggest volume of the water. But when there was a freshet, or the flood in the river was greatest, New River seemed to carry a very large volume of water also. When Kern River was down, and running a small amount of water, Old River seemed

“to take the biggest portion of it. And in time of flood, “a big body would go down New River. In a stage of “low water, Old River would carry the biggest body of “water” (Trans. III, fol. 1734).

[The Stine Canal head-gate across the head of Old River was put in in the fall of 1877 (Trans. III, fol. 872, and fols. 1362-3; Trans. IV, fol. 9).]

New River.

Finding 11. “*New River diverges from Old River towards the right, but not Northerly. After leaving Old River it runs Southwesterly and joins Buena Vista Slough, at or about Section Five (5) in Township Thirty-one (31) South, Range Twenty-five (25) East of Mount Diablo Base and Meridian, at the point known as Cole's Crossing, and so designated on the map hereto*” (i. e., to the Findings) “*annexed, and flows thence to Buena Vista and Kern Lakes, and does not join Buena Vista Slough in or near Section Thirty (30), Township Thirty (30) South, Range Twenty-five (25) East of Mount Diablo Base and Meridian, except that in times of high water a portion of its waters do flow through a shallow channel (shown on the map to these Findings annexed), and empty into said Slough on or about said Section Thirty (30), and thence flow into Buena Vista and Kern Lakes.*” (T. I., pp. 119, 120, and T. V., p. 203.)

As stated above, there is no dispute as to the course of the waters of New River down to the point in Sec. 23, T. 30 S., R. 25 E., where the “Middle or North” and the South Branches separate. That your Honors may the better understand the testimony of the several witnesses relative to the course of its waters from that point on, we here call attention to certain undisputed facts set forth in Findings 67 and 68:

Finding 67. “*In December, 1875, one Souther commenced, and in January, 1876, completed a dam across*

Buena Vista Slough at a point designated on the map hereto" (i. e., to the Findings) "annexed as 'Cole's Crossing,' on or about Section Five (5), Township Thirty-one (31) South, Range Twenty-five (25) East, Mount Diablo Base and Meridian, and south of where the waters of New River enter Buena Vista Slough, and thereby at said point checked the natural flow of the waters of said river through said slough into Buena Vista and Kern Lakes, and caused the waters there flowing to take a northward course and away from the said lakes. In March, 1876, the pressure of the waters against said dam broke through the same and said river resumed its natural flow to Buena Vista and Kern Lakes."

Finding 68. "In the fall of 1876, certain parties commenced the construction of two certain canals, which are correctly laid down on the map hereto" (i. e., to the Findings) "annexed and marked respectively 'East Side Canal' and 'Kern Valley Water Co.'s Canal.' The 'East Side Canal' commences on Sec. 14, T. 30 S., R. 24 E., and extends thence some three miles North on the Eastern side of Buena Vista Swamp. * * * The other canal, heading on Sec. 14, T. 30 S., R. 24 E., as at present constructed, extends northward some twenty-four miles. * * * In June, 1877, the Kern Valley Water Company * * * took possession and control of said canals, and continued the construction thereof northwards towards Tulare Lake. In the fall of 1877 the Kern Valley Water Company reconstructed the dam at Cole's Crossing, and, in connection therewith, constructed a levee extending westward to the bluffs or high ground, and running eastward from said dam about one and one-quarter miles, thereby preventing the waters of Kern River from flowing to Buena Vista Lake, and turning the same northward to their said two canals." * * * (T. V., pp. 194-195.)

We will hereafter show that the construction of these dams at Cole's Crossing have materially interfered with the natural flow of the waters of New River after reaching Buena Vista Slough.

W. R. MACMURDO (for defendant):

The witness' attention is called to map "H," and he is asked:

"Q. Do you know anything about that map 'H?'"

"A. Yes, sir; I know that it is a map of the end of Kern River and part of Buena Vista Slough.

"Q. Is that map correct?"

"A. Yes, sir; it is substantially correct. The levee at Cole's is substantially correct; it extends about a mile and a half east, and on the west it extends a short distance and runs out to the high ground.

"Q. What are those channels marked on that map?"

"A. The one dotted here and there through Sections 22, 21, 20, and a portion of 19 and 20 [(?) 30] is what is called the North Branch of Kern River, sometimes called 'Gage Slough.' The next one, there through a portion of Sections 23, 22, and 27, which is marked in blue, running south to the dividing line between 28 and 27, is the Middle Branch, and the other is the South Branch of Kern River."

"Q. What is the yellow one through 28 and 29?"

"A. That is the continuation of the middle branch which is filled with sand in many places—almost entirely so. The course of the water in Kern River, from Tracey's Crossing down" [N. B.—The Tracey's Crossing here referred to is the crossing on New River, Sec. 24 T. 30 S., R. 25 E., and must not be confounded with "Tracey's Crossing" on Buena Vista Slough], is all of it continuous down Kern River until it reaches the forks on Section 23; there it divides, and a part goes down the South Branch and a part goes down the Middle Branch." (T. IV, f. 1183 to 1186.)

Before following the course of the water through these two branches—the South and the Middle—let us first, and once for all, get rid of plaintiffs' pretended third branch, termed the "North Channel," or

Gage Slough.

In the first place, Gage Slough cannot properly be considered a separate or independent branch of New River. At best, it is but a minor branch of the Middle Branch itself, and in no manner affects or decreases the flow of the waters to or into the head of the South Branch; for whatever waters pass or have passed into Gage Slough, are those only which it takes from the Middle Branch some half a mile or more below the point where that branch diverges from the South Branch.

WALTER JAMES (for defendant), on cross-examination:

"Q. Where does Gage Slough leave the main river?"

"A. On Section 22, T. 30 S., R. 25 E." (T. III, f. 237.)

The South and Middle Branches divide in the east half of Section 23 (vide map H), and consequently more than half a mile from any point in Section 22.

R. L. DIXON (for defendant):

"Gage Slough leaves the river below the Joyce ditch; below that, perhaps half a mile, may be a little more."

(Trans. III, fols. 547-8.) "The Joyce ditch is below the point where the South Branch branches from the other branch of the river" (fol. 509); "it is 400 or 500 yards below the mouth of the South Branch" (fol. 514.)

JAMES DIXON (for defendant):

"In 1872 I struck what is known as the Gage Slough, in Sec. 20. I found water in that slough; if it was running, it was a very slow current. In places it is very deep; I suppose it was ten or twelve feet deep there. I have seen that place repeatedly since. I think it is the same depth now that it was then; and it has pretty much the same appearance. I have been along the Gage Slough, north and south, east and west,

“or whatever direction it runs. It does not continue
 “the same depth all of the way. It runs out into a
 “swamp; no channel at all. The water that was in it
 “then, came from the river. It does not connect with
 “it by any definite channel at all. At the point I struck
 “it, in Sec. 20, it has perpendicular banks. Deep holes.
 “Following it east, I suppose, a quarter of a mile from
 “the eastern boundary of the section, it flattens out into
 “a swamp on Sec. 21. There is no perceptible channel
 “there at all on Sec. 21, until you get clear across the
 “section. On the eastern boundary of the section, near
 “the northeast corner, it forms a channel again. There
 “is no channel between the eastern boundary of Sec.
 “21 until you get within perhaps a quarter of a mile of
 “the west boundary of Sec. 20. That is a swamp. I
 “suppose the slough was 30 feet wide where I struck it.
 “I suppose where it goes out of that section on the west
 “side it is not more than 10 feet wide, and perhaps 2
 “feet deep at the ten foot place.” (T. III., f. 8, 9, 10.)

A channel 10 feet wide by 2 feet deep makes but a sorry show as “a branch of Kern River.”

On cross-examination, the witness says:

“The Gage Slough, to which I have referred in my
 “testimony, is a channel which leaves the river south of
 “where the present head-gate of the Joyce ditch is; as
 “to how far south would be a mere guess; perhaps a
 “quarter or half a mile south.

“Q. What was the condition of the mouth of that
 “channel when you first saw it, of the Gage Slough, in
 “1873?

“A. I saw a portion of it, that I put my head-gate
 “in; I didn’t see the mouth of it until later in the sum-
 “mer; at that time there was a broad, sandy channel,
 “and the water had almost ceased to flow through.
 “What I mean is, the mouth of what is known as the
 “Gage Slough, where it comes out. It continued in
 “that kind of a channel for two hundred yards beyond
 “that point. *It could not be called a channel; it was a*

"kind of swamp, a low, flat place, that the water had
 "spread out over, and unless you confined the water and
 "forced it along in the lowest place, it would not stay there.
 "You had to confine it and make it go on until the channel
 "further along was better developed. The overflow that I
 "speak of was very wide; I cannot tell you how wide;
 "a part of the water would run back into the river
 "again, and flow over the surface and find its way back
 "again into the river, at that time. I suppose it ex-
 "tended 400 or 500 yards before it came into the chan-
 "nel again. From that point down to where I dug out
 "my ditch, it was a very slight channel, a little better
 "than the place where I took it out; it was a very
 "slight channel though, with scarcely any bank. I had
 "to confine it all the way along to get it to flow into my
 "head-gate on Section 21; where I put in my head-gate
 "it widened out again, and made a large swamp in Sec-
 "tion 21, and that continued down to near the east
 "boundary of Section 20, and there formed a well de-
 "fined channel.

"Q. Did that well defined channel continue on down
 "Buena Vista Slough?

"A. Went all of the way through at that time; it is
 "a better channel now than it was then." (Fols. 98
 to 101.

R. L. DIXON (for defendant) speaking about crossing
 Buena Vista Slough near the mouth of the Middle
 Branch, is asked:

"Q. At what part did you cross? Can you point
 "out on this map?

"A. It was about the southeast corner of Section
 "30, T. 30 S., R. 25 E.

"Q. Is that north of the Middle Branch of the
 "river?

"A. Do you designate that as the Middle Branch
 "(pointing to map H.)?

"Q. What do you call that?

"A. I have always called that the North Branch;

"there are some flat sand sloughs lying along north of
 "that—flat places; *I think there is not any slough going*
 "*from Kern River further north than that*; I think it is
 "only in high water the branches overflowed there near
 "the mouth of it, and spreads out there in high water;
 "I know where what is called Gage Slough is; I think
 "that must be it (pointing it out on Map H); that is
 "north of what I call the North Fork of the river, and
 "when I speak of the North Fork of the river, I don't
 "mean the Gage Slough at all. (T. III., f. 493-4.)

Again he says:

"I crossed a channel there, what we call the North
 "Branch, designated on map H in yellow.

"Mr. Garber—That is what we have been calling the
 "middle fork.

"The Witness—I don't know the names that these
 "streams were called; I have always called them my-
 "self, on the ranch, and designated them in relation to
 "my work, as the North and South Branch; *those are*
 "*all the branches of the river that I consider were there.*"
 (T. III, f. 504.)

On cross-examination he is asked:

"Q. Where does what is known as the Gage Slough
 "leave the river?

"A. I can approximate it, sir; it is below the head-
 "gate in what you call the Joyce ditch; it is below
 "that, perhaps half a mile, may be a little more. I
 "suppose that slough, where it leaves the river, is 25 or
 "30 feet wide, where it passes through Section 20, a
 "portion of it is a deep slough with perpendicular
 "banks, was when I went there, now worn down by cat-
 "tle, I suppose 20 steps wide in places, and narrower in
 "others. Something like 20 yards wide, but I cannot
 "measure it accurately; it is about that.

"Q. How deep is it there?

"A. Four or five feet deep, perhaps in some places
 "more than that. I think there are some places in that

"slough ten feet deep. I have a head-gate at the end of this slough. When I first went there, below that point running west, there was no slough." (T. III, f. 547 to 549.) "There was no water ever running in that slough except what I turned out of my ditch since I have been there. Where the Gage Slough connects with the river, I suppose it is a foot deep, hardly that. I have never seen any water run from the river into the head of that Gage Slough.

"Q. Have you ever seen any water run from the river into that slough in any way?

"A. Yes, sir.

"Q. When?

"A. When the river is high and overflows the banks between the old ranch ditch and that slough, it runs over the banks on what is known as the Stock place in Section 22, and runs into the slough.

"Q. What is there, if anything, on the bank of the river at the mouth of that slough that prevents the water from running into it?

"A. The former owners of that land put a small levee across the mouth of it, right on the bank of the river. I added to it at one time. I don't know how high it is—2½ feet, I suppose, and about the width of the slough in length.

"Q. Is that levee high enough and long enough to prevent any water from running into that slough at all?

"A. It could not go into the mouth of it except at very high water; it goes over the bank above it and runs into the slough." (Fols. 552 to 554.)

And on re-direct examination:

"Q. How is the bed of the Gage Slough, Judge, on the other side of the levee from the river?

"A. *A stranger would pass that place without ever knowing he had passed any slough. It is all flat there; there is a little bank on the north side of it, a short way, but in passing over the country a stranger would never know he had passed any slough. When the water rises*

"in it 6, 8, or 10 inches, it flows to the south; it has no bank, is all flat; it runs out into the branch of the river again, the North Branch. Had that levee not been put there, in ordinary stages of water the water would not have run into the Gage Slough, no more than it would over the bank. Ever since I have been there, at high stage of water it would come in there; and it comes over the bank on both sides of it, above it and below it."

On re-cross examination.

"I think I said that the Gage Slough, where it leaves the river, was 20 or 30 yards wide—something like that."

"Q. How far did it continue going west that width before it spreads out?"

"A. The water flows right out of it at once right over there from that point on the south."

"Q. And that continues from that point, how far?"

"A. Sometimes there is a little bank for 20 steps, and then there is no more, it is all spread out again to the south." (F. 585-6.)

L. L. DIXON (for defendant) says:

"I never considered Gage Slough a branch of the river." (T. IV, f. 727.)

These Dixons all lived at the Buena Vista Ranch, in the immediate vicinity of Gage Slough, and were for years thoroughly familiar with that slough. They each state that it is not a branch of the river. We deem it unnecessary to cite further testimony on the subject.

The South and Middle Branches of New River.

W. R. MACMURDO (for defendant):

"The course of the water in Kern River from Tra-

“cey’s Crossing down, is all of it continuous down Kern
 “River until it reaches the forks on Section 23; there it
 “divides, and a part goes down the South Branch and
 “part goes down the Middle Branch. That which goes
 “down the South Branch continues in that branch down
 “to Cole’s Bridge, and empties into Buena Vista Slough
 “at that point. The part that goes down the Middle
 “Channel runs down to Section 28, near the line be-
 “tween Sections 28 and 27, T. 30 S., R. 25 E., then it
 “runs from there in a southerly direction to the South
 “Branch and continues in the South Branch down to
 “the Slough and empties into the Slough near Cole’s
 “Bridge.” (T. IV, f. 1186-7.)

WALTER JAMES (for defendant), speaking of the
 course of water at a point where the Middle and South
 Branches separate as he found it in April, 1881, says:

“The River divides on Sec. 23, T. 30 S., R. 25 E.
 “One branch goes southward through Sections 26, 27,
 “34 and 33, T. 30 S., R. 25 E., and across the line of
 “Section 4, T. 31 S., R. 25 E., crosses the Township
 “line and discharges into Buena Vista Slough near the
 “bridge; that is the South Fork.

“Q. Where does the Middle Fork flow?

“A. The other branch of the river flows through
 “Sections 23, the south portion of 22, crossing the
 “northwest quarter of Section 27, flowing thence south-
 “ward, near the line between Sections 27 and 28, and
 “into Section 35, thence southwesterly to a point near
 “Cole’s Bridge and there discharges into the slough;
 “that map is correct, (referring to Map H).” (T. III,
 f. 171-172.)

“I was from Cole’s Bridge to the mouth of the Mid-
 “dle Fork of Kern River; there was no water in the
 “Middle Fork; I was at a point on the river where the
 “water ceased flowing in the Middle Fork; this point
 “was near the line between Sections 27 and 28 in Town-
 “ships 30 South, Range 25 East, north of the quarter
 “post between those sections.” (F. 170.)

S. W. WIBLE (for plaintiffs) says: "At present the water running from Kern River into Buena Vista Slough runs through the south channel." (T. II, f. 806-7.)

GEORGE DAVIDSON (for plaintiffs) says: "The water is now running to Buena Vista Slough through one fork, known as the South Fork. There is another fork, which is now empty, except a small amount of back water, which enters it through Buena Vista Slough." (T. II, f. 1477.)

SOL. JEWETT (for plaintiffs):

"Q. Do you know where the waters of Kern River empty?"

"A. They empty in at the bridge below the lake into Buena Vista Slough." (T. II, f. 248.) "I was down at the mouth of New River two years ago, and I was there before, at the time that the bridge was located—the bridge that the county built. The one there now is perhaps in the same place. I can't fix the section. It was near Cole's ranch." (T. II, f. 254.)

JAMES DIXON (for defendant): "In April, 1872, I went to Tracy's Crossing, on the river" (T. III, f. 3); "I did not cross the river there; I attempted to cross; I got my horse mired, and came out, and I went below until I struck another branch of the river, running south. From my knowledge of the country now, I think it was near the Alejandro place. I think that ranch is on Sec. 26, T. 30 S., R. 25 E. I don't know that those branches of the river have any particular names, but according to the points of the compass, I would call that the South Branch. I did not cross there. The water seemed to be fully as high as it was at Tracy's Crossing. It looked dangerous, and I did not attempt to cross it. I was deterred from crossing the river on account of the appearance of the water. There was a great deal of water there, and the cur-

"rent was very swift. I visited that country again in
 "the neighborhood of the Alejandro Ranch, or Tracy's
 "Crossing, in November, 1872" (for date, vide T. III,
 f. 11). "I crossed that South Branch of the river—
 "the same branch that I had turned back from when I
 "was down on it before. There was a great deal of
 "water there, and a very swift current; it was deep
 "enough to run into the buggy; it ran into my buggy.
 "After crossing there I went to the old corral, Section
 "29, the same township and range. I found a great
 "deal of water running between this crossing and the
 "old corral. The country seemed to have a number of
 "small channels there which ran south. Those chan-
 "nels were all running south—running towards the
 "lakes. I camped at the old corral for the night. The
 "next day I crossed another branch of Kern River, and
 "went north to Section 20, the present location of the
 "Buena Vista Ranch; I know what branch that was
 "now, by this map.

"It was a branch, represented on that map north of
 "this south branch, running through Sec. 29, T. 30, R.
 "25 E. I found water there. The stream was wide,
 "but shallow, and easily crossed. I only remember it
 "was not deep. I got there at night, and it looked like
 "a formidable stream; and it was dark. It was quite
 "wide at that point; perhaps 300 feet wide. I waited
 "until morning, and crossed it without any difficulty. I
 "don't think the water was over a foot deep in it, in the
 "deepest places." (T. III, fols. 5 to 8.)

In 1873 Dixon built a ditch known as the Joyce Ditch,
 from a point in Section 23, on the north bank of the
 Middle Branch, below where it diverges from the South
 Branch. Says he:

"In the spring, when the water was high, it flowed
 "directly into the ditch without any trouble. During
 "the summer we had to build wing dams out into the
 "river, and also to put in a dam in the South Fork of the
 "river, which is a short distance above the head gate.

"I put in this dam on the South Fork, at the point
 "where it leaves the North Branch of the river. I put
 "the dam in first in the summer of 1873. The object
 "of putting in the dam was to cause enough water to
 "flow down through this Gage Slough into the ditch.
 "There was not water enough in the channel of the
 "North Branch of the river without that. At that time
 "the bulk of the water then went through the South
 "Branch of the river until I would divert enough of it
 "to make it flow into the North Branch. When we
 "first put in that dam the water running in that North
 "Branch, I could not estimate; it was a large stream of
 "water, and it filled the channel pretty full.

"Q. I am speaking of the Northern Branch?

"A. I thought you asked me how much was running
 "in the branch that I put the dam across?

"Q. How much was running in the branch that you
 "put the dam across?

"A. I say there was a good stream of water. The
 "bulk of the water that was running down this river
 "was going in the South Branch, where I put the dam
 "in. There was some running in the North Branch;
 "not enough to fill it; not enough to give me plenty of
 "water in the ditch. I could not state exactly the
 "amount. There was not enough to fill my ditch to
 "keep it full. I have frequently been along on the
 "points of the country between the head of that ditch
 "and where the North Branch of Kern River empties
 "into Buena Vista Slough. (T. III, fols. 21 to 24.)

"Q. Do you know which way the water of that
 "river ran after passing at this point that you speak of
 "in its natural flow through both channels beyond the
 "point of separation?

"A. The direction of the North Channel, I think, is
 "south of west.

"Q. I am not speaking of the direction, but where
 "the water went to.

"A. It went into Buena Vista Slough; I could not
 "say that I was ever right at the mouth at the time that

“the water was running out of this North Branch.
 “From my knowledge of the country I can say that the
 “water would flow, and I have seen it flowing, into the
 “lakes from these channels, until the lakes were full
 “enough to make it go the other way. I have seen it
 “flowing both ways.

“Q. After the lakes were filled up you say the water
 “would flow the other way?

“A. That was always my impression of the country,
 “that after the lakes were filled up it would flow north-
 “west.

“Q. That the water would first flow then, as I under-
 “stand you to say, to fill the lakes, and after that flow
 “north-west?

“A. That is my belief. I have seen the water
 “flowing in that direction from those streams. (T. III,
 “fols. 26 to 28.)

“I saw Buena Vista Slough, I think, in Decem-
 “ber, 1876 (for date, *vide* T. III, f. 44), at Tracy’s
 “Crossing—not at the same Tracy’s Crossing I spoke of
 “before. Tracy’s Crossing, on Buena Vista Slough.
 “There was some water there then.

“Q. Was it running?

“A. I don’t know; I suppose it was; I don’t recol-
 “lect noticing much about it, except that I crossed it in
 “a buggy. I know there was water there.

“Q. Was it deep?

“A. No, sir; it made no impression on me. I know I
 “crossed it there. I next saw that slough on that same
 “occasion, at Cole’s Bridge. The water was running
 “there—running into the lakes.

“Q. There was a good head of water?

“A. Yes, sir; a big head of water. There was a
 “very swift current right at the bridge—a swift current
 “towards the lake. I would like to say that there was
 “an obstruction in the slough, and the current was very
 “swift passing through under the bridge—the old bridge
 “across the slough. There were men there trying to
 “stop the water from going into the lake. I stayed

“there a few minutes, and went on to the San Emidio Ranch; I returned in a day or two, and passed by that place again. The water was not then running into the lakes; it had been stopped at the bridge. I did not see the water running in any direction there; it was standing. The water was standing at the bridge—no current. The water was standing on one side against the embankment; some water on the inside. (T. III., fols. 29 to 32.) When I returned from San Emidio at that time, I crossed Cole’s bridge and went east some distance, I could not tell exactly where, and then north, and crossed the south branch of Kern River again. Water was very deep; I considered it very dangerous crossing; the current was very swift.

“Q. Whereabouts was that place? Was that the place that you referred to before?

“A. I think it was. It was near the Alejandro place.” (T. III., f. 41.)

R. L. DIXON (for defendant):

“Early in January, 1876 ” (T. III, f. 498), “crossed Cole’s Bridge ” (fol. 499), “and went up the levee, east, three-quarters of a mile; then turned northward to go back to my ranch ” (fol. 501)—“the Buena Vista Ranch, on Sec. 20, T. 30 S., R. 25 E.” (fol. 489).

“Q. Did you cross any channel, or any water?

“A. Yes, sir ” (fol. 502); “I came to the South Branch; I found there a deep channel; the water was very swift—so much so that I objected to crossing it; we did cross it, however; the water was running towards Cole’s Bridge ” (fol. 503). “I then crossed what we call the North Branch—designated on Map H in yellow ” (fol. 504). “After reaching this branch colored yellow on Map H, we found water there and crossed it. I suppose the deepest part of it was a foot and a half. The deepest part was at the bank, and running out to the flat, where there was almost no bank. I don’t think it struck the buggy axle; and

“from that it went down to nothing” (fol. 505); “we
 “could see that the water was not deep; there was a
 “current there; not much of a current; it was running
 “along; I suppose it was forty feet wide—may be fifty;
 “the average depth, I suppose, would be a foot to fif-
 “teen inches. The South Branch, where we crossed it,
 “was not so wide, but it was a great deal deeper and a
 “great deal swifter; it was very swift and rapid; I
 “should think the South Branch carried five or six
 “times as much water as the other; it may be more than
 “that; I had no means of measuring it” (fols. 506-7).

Again, Dixon says:

“In 1875 I found the water failing on the ranch, and
 “I went up to the head of the (Joyce) ditch to see what
 “was necessary to keep it there. I found nearly all of
 “the water flowing into the South Branch of the river.
 “There was very little flowing into what I call the North
 “Branch; not enough to fill my ditch—not enough to
 “come into it. There was not enough to run from that
 “point down the north channel to Buena Vista Slough;
 “it would be lost before it got there. I put in a weir
 “of brush, hay and sand in the mouth of the South
 “Branch, across the mouth of the South Branch, until
 “I turned sufficient water down the North Branch to
 “fill my ditch. There was a good deal of water run-
 “ning down the South Branch; more than necessary to
 “fill my ditch—to fill two or three of them; two or three
 “times more than the amount I turned in. I planted
 “stakes at the mouth of the South Fork, and made a
 “brush dam just above its mouth, so as to turn the
 “water into the other branch of the river; and turned
 “in sufficient quantity to answer my purposes. It was
 “a good deal of work. As I would begin, the current
 “would wash out my dam, you know—a strong current.
 “I attempted it two or three times, and I had to haul
 “hay up there to enable me to do the work quick. At
 “the head of the South Fork the water that went down the
 “South Fork was fifty yards wide; the depth was over two

“feet; it was knee-deep, running a strong current, and
 “when we could get a place filled up, it would run in
 “very rapidly and wash it out. The dam that I put
 “across the mouth of the South Fork did not remain
 “there. The first high water that came on washed it
 “out. Whenever the water would come up near the
 “top of it, it would wash out. I think I have put a dam
 “in there every year. I have put a dam in at one point
 “or another, so as to turn the water into the North
 “Fork.

“Q. Whenever you went there in low water, did you
 “find the water running in the South Branch?

“A. Always when there was water, sir; at a low stage
 “of the water, the water would all go, if I permitted it,
 “into the South Branch. There has to be a good stage
 “of water, a fair stage of water to run into the North
 “Branch—what we call a medium stage. That has been
 “the condition ever since I have known it, at that
 “point” (fols. 510-15).

On cross-examination Dixon is asked:

“Q. You speak of putting obstructions into the
 “South Fork where it leaves the main river, just above
 “your headgate, to throw more water into the North
 “Fork. Where would you commence?

“A. Sometimes at one point of it and sometimes at
 “another; sometimes a little above the mouth on the
 “south bank of the river, and bring it down so as to
 “throw the current to the north bank of the river.

“Q. Would you extend that obstruction across into
 “the North Fork, and across the North Fork?

“A. No, sir; my object was to throw the water into
 “the North Fork.

“Q. Would you extend that a part of the way across
 “the North Fork?

“A. No, sir; not when I was damming the South
 “Fork.

“Q. Have you ever placed any obstructions of any
 “kind across the North Fork?

"A. Yes, sir; for the purpose of turning water into the ditch when it was low.

"Q. You put this across the North Fork, too?

"A. I took out the ditch and turned it in. When I had a ditch full of water, I would stop it there and get it all in, making a ditch of the river bed. I think the first time I put any obstructions into the North Fork was in 1879. The North Fork makes a little island immediately in front of the ditch, and I put it from the bank of that island above. Made a wing dam to throw the water into the mouth of the ditch. I would force that on to the bank near the head of the ditch there.

"Q. So, then, you made an obstruction clear across the North Fork?

"A. Yes, sir. There was not water enough to fill the ditch in low water. That obstruction that I put in the North Fork in 1879 was of brush, sand and willow sticks. It only remained until the first flow of water came to wash it out. It was a temporary thing. Whenever the water would come these slight obstructions washed away directly. It was simply to turn the water into the head of the ditch when it was low. I don't think I have put any obstructions across the North Fork since then. I think there are no obstructions there now." (Fols. 555 to 559.)

WILLIAM SOUTHER (for defendant):

In March, 1874, Souther went from Tracy's Crossing, on Buena Vista Slough, in Sec. 24, T. 30 S., R. 24 E. (marked on Map H, "Old Tracy Ford"), to the Alejandro place, in Sec. 26, T. 30 S., R. 25 E.; and in doing so crossed the several branches of New River shown on Map H. On or prior to March 3rd, 1874, (for he was then on his way to Bakersfield, where he arrived on the 3rd March, 1874, (T. III, fol. 734). Says he:

"After crossing at Tracy's crossing, I went in a northerly direction. From the marks and indications on the map, I think I went to Section 19—the south

“half, perhaps, of Section 19; then to the north half of 20,
 “and to the south half of 28, crossing a cut, or a branch,
 “leading from the central branch, apparently, to the
 “south branch. From there I went on into Section 27.
 “Then I crossed the east branch, as I would term it, or
 “south—whatever it is termed here, the branch there
 “runs in a southwesterly direction—southeast to a
 “branch that runs along the line of the Alejandro ranch.
 “I think that the Alejandro ranch must have been on
 “Section 26. In going across there I crossed several
 “channels, or places where water had run. There was
 “no water except in these two. I don’t remember that
 “I crossed any water except that.

“Q. By these two, which do you mean?

“A. I mean the two last; one in 28 and in 27. I
 “mean the one running down to and dividing 28 and
 “27.

“Q. Which course did these two last channels seem
 “to take?

“A. These channels run in a southerly direction.
 “Before coming to those two, we crossed some dry
 “channels that had sand in them—indications that wa-
 “ter had run there.

“Q. Well, on this map there is, in the neighbor-
 “hood of 19, shortly after leaving Tracy’s crossing, a
 “channel marked. Do you remember crossing one
 “shortly after leaving Tracy’s crossing?

“A. Well, we crossed something of that character,
 “perhaps several. I don’t remember particularly about
 “it. It has been some time. *In going from 19, the first*
 “*channel that I remember is on Section 29—the Middle*
 “*Fork. That channel was a dry, sandy channel at the*
 “*time. There was no water running in it. Then we*
 “*crossed the channel between 27 and 28, and that had water*
 “*in it. There is where we bogged; right alongside of*
 “*that water, bogged the teams down. I perhaps would*
 “*not remember it so particularly had it not been for*
 “*that. There was considerable water running there.*

"Where I crossed it it was running nearly a due south course.

"Q. Then, the last channel that you crossed, did you find much water?

"A. Yes, sir. The most of the water we crossed after leaving the main Buena Vista Slough at Tracy's crossing, was at that last channel. Perhaps three or four times as much water was running in this channel at the time I crossed; that is the last channel; the one near the Alejandro ranch. The house was some distance in the field. All the water seemed to be running southward. It was all running down in that direction. The first stream was running nearly due south; the other was running in a southwesterly course. I have since seen those channels where I found the water, and I know where they empty. They empty in at Cole's bridge, on the Buena Vista Slough, into the Buena Vista Slough." (Trans. III, fols. 629-634).

"From my knowledge of New River and my experience here in this County, New River—all the branches that I have described and which we crossed there—came down and ran in at that point above the bridge, or near the bridge, within a few feet of it, into Buena Vista Slough. It turns and runs back into the Lake whenever the water is low enough in the lakes, of course, to allow the water to run." (Fol. 665-6).

C. L. CONNER (for defendant) also crossed these several branches of New River in March, 1874, following substantially the same route as Souther had previously done (T. III, pp. 228-9). In going from the Buena Vista Ranch to Keith's place just southwest of the Alejandro place, Conner says that after leaving the Buena Vista Ranch he went two and a half to three miles before he crossed any water (fol. 911). That he then came to water which had the appearance of being a river, about eighty feet wide and three and a half or four feet deep, running rather rapidly and in a southerly

direction. That after crossing the stream he then came to another having the same general appearance as the first, also running in a southerly direction (fol. 913-14). Says he:

"The second contained perhaps more water. It was about the same depth as the first; between three and four feet, but some wider. It was running rapidly and in a southerly direction (fol. 914). The streams were about a quarter of a mile apart, I should judge. I crossed both of them before I reached Keith's place. The second one went through a portion of Keith's place, perhaps within two hundred or three hundred yards of his house." (fol. 914).

L. L. DIXON (for defendant):

In March, 1877, going from the Buena Vista Ranch to the Lake Ranch on Sec. 11, T. 31 S., R. 25 E., Dixon crossed the several branches of New River shown on Map H, (T. IV, p. 181). Says he:

"I crossed the central branch; crossed it somewhere in Section 28; there was then no water in it at all (fols. 723-4). I then crossed the two southern branches along in Sections 33 and 34; found water in both of them; think it was running in the extreme southern branch; there was water in the other one; would not be positive whether it was running or not; if it was running it was running a slow current; the extreme southern branch had running water in it. (fols. 724-5).

"Q. Now, when you crossed that central branch, Mr. Dixon, you said there was no water in it. What sort of a channel was that?

"A. It was a channel tolerably wide, with flat banks.

"Q. How deep was the bed of the channel below the surrounding country—below the banks?

"A. Well, where I crossed it I don't think it was more than six inches; twelve or thirteen inches in the deepest place.

"Q. How deep were the banks of those two forks of the southern channel?

"A. They were pretty steep banks. (Fols. 727-8.)

"Q. Mr. Dixon, will you look at this Map 'H.' There is a channel there connecting this middle branch or central branch with one of the south branches. Have you ever seen that?

"A. Yes, sir.

"Mr. McAllister. You mean that cross channel?

"A. Yes, sir.

"Mr. Haggin. When did you first see that?

"A. Three or four years ago; I could not name exactly the time; I used to go up there to go in swimming.

"Q. To go in swimming in that channel?

"A. Yes, sir.

"Q. Why would you go there to swim?

"A. It was a nice deep place to swim in. I used to hunt ducks up there some time in the winter.

"Q. You have known that you say. How many years ago did you notice it?

"A. Three or four years ago; I don't remember exactly when.

"Q. Did you know that in 1877?

"A. Yes, sir; I think it was as early as that, if not earlier." (Fols. 728-30.)

On cross-examination Dixon is asked:

"Q. You say that you saw that cross channel running from the middle branch to the southern branch as early as 1877?

"A. Yes, sir.

"Q. How large was that cross channel when you first saw it?

"A. About the same size as it is now.

"Q. The first time you saw it, it was as large as it is now?

"A. It might have been a little smaller; I didn't measure it.

"Q. What proportion of the water ran in the middle branch at that time, when you first saw it?

"A. Well, sir, unless in extreme high water, in the middle channel, I never saw water in it until 1878.

"Q. What is that?

"A. *Unless there is very high water, no water runs in the middle channel as long as I have known it.*

"Q. When did you last see water in the middle channel?

"A. I saw it there in 1878, in high water.

"Q. It runs there in very high water, don't it?

"A. In very high water." (Fol. 774 to 776.)

H. NOBLE (for defendant):

"Was at Cole's bridge in the spring of 1874 or '75; can't say positively which; there was a bridge constructed there at that time." (Must have been 1875, for the bridge was not constructed prior to Dec., 1874. *Vide T. III, f. 321.*) "The water was quite high about where the bridge was. There was quite a strong current running towards Buena Vista Lake. All the water I saw passing through the channel was flowing down towards Buena Vista Lake. (T. IV., f. 197-8.)

C. G. JACKSON (for defendant):

"In the spring of 1871, April or May (T. IV, f. 528), crossed the South and Middle Forks of New River; there was more water in the South Fork than in the Middle Fork. The water was running; it ran down in the slough just north of Buena Vista Lake.

"Q. What direction did the water run then?

"A. The water was running into Buena Vista Lake. (Fol. 529-531.)

"Q. Have you been around through Buena Vista Slough and in the vicinity of these lakes you refer to, where these branches empty into the slough, at other times?

"A. Yes, sir.

"Q. During what years?

"A. During 1872 and 1873 I have seen the water running from the river there. I was there in 1875.

"Q. In 1872 and 1873, after reaching the slough, which way did the water run?

"A. It ran into Buena Vista Lake.

"Q. You say you were there in 1875?

"A. Yes, sir.

"Q. How was it in 1875?

"A. It was running into Buena Vista Lake from the south side. I was on the south side of it—the south-east side of it.

"Q. Was that always the way whenever you were there?

"A. No, sir; the first time I was there was in 1866.

"Q. I mean during the years you have mentioned?

"A. Yes.

"Q. Always running toward the lakes?

"A. Yes, sir.

"Q. How was it in 1866?

"A. There was not any river there then." (Fols. 531 to 533.)

On cross-examination:

"Q. What season of the year 1872 and 1873 were you at Buena Vista Slough?

"A. In 1872 it was along about March or April. In 1873 I think it was in the spring, about the same time; a little later, I think. It may have been as late as May." (Fol. 538.)

E. H. DUMBLE (for defendant):

"In December, 1871, was where Cole's Bridge is now. On that trip I did not go north of the South Branch of the river. There was very little water there at that time. I don't think it was running at the time. It might have been running. There was no perceptible current that I could see. I was next there in January, 1872. The water was running. There was some considerable water. I was there

" hunting and fishing. I went up to about the Middle Fork, following along the east side of the slough. The water was running. It was running down into Buena Vista Lake, and there was a considerable body of water running.

" Q. Did you see any running in any other direction?

" A. I did not, no, sir; that water was running towards Buena Vista Lake.

" Q. Were you then down as far as the Middle Fork?

" A. Yes, sir; up, rather, north.

" Q. That is, as the water was running then?

" A. Yes, sir. I was there next on the 5th of July, 1873, at Cole's bridge, in that vicinity. We were hunting and fishing. There was very little water there then; it was running—running south. We did not go north of the South Fork on that trip. The water was running towards Buena Vista Lake. I was there in January or February, 1876, at Cole's bridge; there was water there then." (T. IV, fols. 1041 to 1043.) " In 1876 the water was backed up on the north side of the bridge; there was a weir and dam built in the bridge. The water was dammed up. I should think it was four feet higher on the north side than it was on the south side—four or five feet difference" (fol. 1045).

W. McFARLAND (for defendant):

" First saw Buena Vista Slough, about Cole's Crossing, in 1872, late in the summer or fall—about August or September. There was considerable water there; at that point it was flowing south.

" Q. Did you see any water at that point flowing in any other direction?

" A. I saw water at the Tracy Crossing. If it was running any way it was running north; but as near as I can recollect now, it was very still. My recollection is, that the water was not running at Tracy's Crossing; was still; but was running at Cole's." (T. IV, fols. 1467-8.)

E. G. McLEAN (for defendant):

“Q. Do you know the several branches of Kern
“River or New River, generally denominated the North
“Branch or North Channel, Middle Channel and South
“Channel, or any of these, below Tracy’s Crossing?

“A. Yes, sir; I have been across them repeatedly
“for several years.

“Q. During what years have you been across there?

“A. I think I was across there in 1875, 1876, 1877
“and 1878, 1879 and 1880, nearly every year, I think,
“since I have been living down in that portion of the
“country. I have been at Cole’s Bridge. I have seen
“water in these branches, and I have crossed them
“when they were dry, and at all stages of water,
“almost, when they were passable at all. I crossed
“them in 1875, I think; in the spring, I think. I found
“water in them very full. I crossed them somewhere
“near the east line of Section 21, I think it is. It was
“in Section 31, T. 30, R. 25, a little above—east of the
“Buena Vista ranch. I started from there and I went
“in a southeasterly direction. In going across there I
“crossed the North Channel. There was very little
“water in the North Channel. I had no difficulty in
“crossing it. The Middle Channel I crossed without
“without much difficulty. The South Channel I crossed;
“it was very deep, and had, as I remember, a very
“swift current. I had difficulty in crossing it. The
“current was very swift. It was almost swimming. At
“that time I think the bulk of the water was going in
“the extreme South Channel. That was in the spring
“of 1875. I crossed it again later in the season of 1875,
“at exactly the same place. There was much less wa-
“ter in all the channels. There was very little water in
“the North Channel. The Middle Channel had a shal-
“low stream. The South Channel had a current, and
“was running through a more defined bank. I thought
“the South Channel carried the most water. I have
“crossed there when the Middle Channel and the North
“Channel were both dry, and there was water in the

“South Channel, and it was flowing with a considerable
 “current. I think that was the same year at a later
 “period. I passed there several times in subsequent
 “years, when I found no water in any except the South
 “Channel, and at such times the water would be flowing
 “in the South Channel. It flows in the South Channel
 “in a southwesterly direction. It empties into the
 “slough at the head of Buena Vista Lake. I was there
 “first in 1874, but the water was very high in the lakes
 “and in all the country. That was in the latter part of
 “November.” (Trans. IV, fol. 1530-34).

“Q. About these branches of New River, the south
 “and middle branch? What is the course of that water
 “after it reaches Buena Vista Slough?

“A. It runs into Buena Vista Lake when there is an
 “ordinary stream; when there is a very heavy stream of
 “water it overflows. It runs into Buena Vista Lake
 “from the Southerly Branch.

“Q. Did you ever see the dam there at Cole’s
 “Bridge?

“A. Yes, sir; I have seen a levee clear across there.
 “The first time I saw it was about the time it was com-
 “pleted, in 1877 or 1878. I understand the effect of
 “that was to turn the water from Buena Vista Lake,
 “down through the swamp in the direction of Tulare
 “Lake northward.

“When you said the water flowed into Buena Vista
 “Lake, did you mean whether the dam was there or
 “not?

“A. No, sir; if the dam was gone. My answer did
 “not mean when the dam was there. I saw it when
 “there was no dam there. Then the water went to-
 “wards the lakes. When the dam was there it had to
 “go in the other direction.” (Fol. 1540-41).

T. W. BARNES (for plaintiffs) was constantly about
 that portion of Buena Vista Slough from 1867 to 1879,

in fact from the formation of New River to the present time. (T. II., pp. 333-4.) He says:

"I know where the waters of New River enter Buena Vista Slough. It goes into the Slough at three different points; the fourth point runs into the east side of Buena Vista Lake; starting from Section 24 it leaves New River at Tracy's Crossing.

"Q. We will take the channels as we come to them; going down the river you say there is a channel at Section 24 that runs into it?

"A.—That goes through the Lake Ranch into the head of the Lake; the east side of the Lake; when the water begins to run over the banks of the River, it takes this channel.

"Q. Passing down from that channel what channel will you find next?

"A. Find next what is called the South Fork channel; it runs into it near Wible's; the swamp land in there. There is a levee across Buena Vista Slough and they have a weir.

"Q. Where does that water enter on to or reach Buena Vista Slough?

"A. When it comes down there the same as this one the Lake was dry, and the slough was low; it empties into the slough and runs up towards Buena Vista Lake.

"Q. Then what channel do you come to after that last channel?

"A. You come to what is called the Middle channel; that goes into the slough also.

"Q. Where did the waters that go through that channel run after reaching the slough?

"A. The most of the time it runs up the slough and into the Lake until the Lake becomes full.

"Q. *From that middle channel?*

"A. *Yes, sir; a portion of it may go below. Until the Lakes fill up it runs into the Lakes.*

"Q. Where does the water run that runs in this third channel that you speak of? (Gage Slough.)

"A. It runs into Buena Vista Slough also.

"Q. After reaching Buena Vista Slough where does it run?"

"A. Its natural course is northward towards Tulare Lake and Weed Island." (T. II., fols. 1348 to 1354.

We are aware that plaintiffs will urge upon your Honors, that Barnes did not mean that the waters of the Middle Branch of New River flowed to the Lakes after reaching Buena Vista Slough. They will contend that at a subsequent period Barnes attempted to explain his testimony as to this Middle Branch. But your Honors will see, from mere perusal, that the explanatory statements of Barnes are not only false in themselves, but were the result of some "outside influence." When he was first examined as to the course of the waters of the several branches of New River, he was questioned particularly as to the Middle Branch, and having answered that "Most of the time it ran up the slough and into the Lake," he was again asked "From the Middle Branch?" "Yes, sir;" said he, "a portion of it may go below; until the Lakes fill up it runs into the Lakes." Now let us see what his explanatory statements are and how they happen to be made. We quote from the Transcript:

"The Witness—I understand there is some mistake in the way my testimony was, in regard to New River emptying into the slough down there. If I said it was the Middle Fork emptying in above, and running in towards the bridge, I meant the main channel of the river, north of the Middle Fork of the North. There is where the river formed a sand-bar in 1867, across the slough, at the main channel. All of the water from that sand-bar runs into the lake, toward the lake. The main channel of New River emptied in at this dam, which stops the slough, and the water goes down the slough, and all of the other water runs towards the lake.

"Mr. Houghton—Q. Did you say that the water in

“the South Fork at that time, in 1876, when the sand-bars were formed, ran into the lake?”

“A. Yes, sir; but the South Fork and little sloughs, making off from the river, run into the lake. The other main fork of the river runs north, towards Tular Lake. There is a sand-bar forming right at the south side of where it empties into the slough.

“Q. Where the middle or large fork empties into the slough?”

“A. Yes, sir.

“Q. You call the middle fork the main fork of the river?”

“A. Yes, sir. I have not been there for two months and over. But when the river opened its channel, the main fork—the main body of the water—went north, and the balance of those other little streams, the South Fork, ran into the lake, on account of that sand-bar—of the sand-bar.

“The Court—That is an explanation of your former testimony?”

“A. Yes, sir.

“Mr. Garber—Who suggested to you that there was any mistake in your testimony?”

“A. I don’t know; I heard it on the street; that my testimony did not corroborate some others; and I remember what they told me—that I had got the Middle Fork for the North Fork or South Fork.” (T. IV, fols. 154 to 157.)

We submit that his explanation is both unintelligible and false.

J. PENSINGER (for plaintiffs):

“Q. Have you ever been down to the mouth of New River?”

“A. Well, I don’t know; I have been all along. I have been past the mouth of it; I have been along the opposite side from the mouth” (Tr. II, f. 1279),

"and have crossed all the branches close down by the slough.

"Q. Where did the water of that river (New River) run to?

"A. Well, I have seen it running south and I have seen it running north. I saw it running south, I think, in 1874, into the Buena Vista Lake.

"Q. Was it all running into Buena Vista Lake then?

"A. I could not say that. It was all running in, that was running by there.

"Q. All that you saw was running into the lake?

"A. Yes, sir" (fols. 1281-2).

Even CROCKER (plaintiff) himself states that the waters from the Middle Branch ran into Buena Vista Lake when the lake was low, but being promptly checked and told by his counsel that those waters went the other way, he seems to realize that in running them away from instead of towards his lands he is swearing away the very foundation of his case, and accordingly turns the water north instead of south. He was asked by Mr. Houghton:

"Q. How many forks does the river form before it empties into Buena Vista Slough?

"A. It had three forks when I saw it last there. It had two when I first knew it. Nearly all of the water was in one.

"Q. In which one was the water?

"A. It was in what is now called the centre channel.

"Q. What was it then? You say it is now the centre channel; what was it then?

"A. It was then about the only channel.

"Q. Was it the north or the south channel?

"A. It was the north channel.

"Q. Where does the north channel empty into Buena Vista Slough? That is, the channel which is now the centre channel, and which was formerly the north channel?

“A. It empties in a little north of where the bridge was, and about, I should judge, a quarter of a mile, perhaps half a mile, north of where the south channel empties into it; but I am not positive about that.

“Q. Now, when you first saw water—the main body of the water in this north channel, after the water reached Buena Vista Slough—which way would it run?

“A. When the lake was at a low stage the north channel ran into Buena Vista Lake.

“Q. THE NORTH CHANNEL RAN TOWARDS TULARE LAKE?

“A. The south channel.

“Q. I am speaking of the north channel?

“A. It ran north.” (T. II, 523 to 526).

Now, Crocker knew perfectly well what he was saying when he stated that the north or middle branch ran into Buena Vista Lake. There is too much detail about his statement to permit for a moment the supposition that he was referring to the south branch. He had previously said that when he first knew these forks *nearly all the water was in the north now called the centre channel, which was then about the only channel*, and when asked which way the water in the north channel would run at the time he first knew it—that is when it constituted “about the only channel”—he meant what he said: *that when the lake was low the north channel ran into Buena Vista Lake*.

Obstructions at Cole's Crossing.

R. M. WILKINSON (for defendant):

“The bridge at Cole's was built in December 1874, or January 1875. A levee was also built connecting with the bridge; the levee was commenced at the same time as the bridge, and was finished some time in the summer of 1875.” (T. III, f. 321-2.)

F. P. MAY (for defendant):

"In September and October, 1875, I went down to Buena Vista Slough and worked with Baker & Lundy in digging a grade for the county; we were taking care of the roadway on the east side of Buena Vista Slough; the work was done on Cole's Bridge, Cole's Ranch; that is south of the slough; the work consisted of scraping and building grades, building embankments and roadways; at that time my camp was on the west side of the slough, and they worked on the east side; I had occasion to cross the slough during those two months, to and from the work, three times a day; I crossed it north of and near Cole's Bridge; there was no water in the slough at the time I crossed it; in these two months it was dry land." (T. III, f. 116-17.)

WM. SOUTHER (for defendant):

"December, 1875, I sent a man by the name of Ober down to Buena Vista Slough for the purpose of putting a dam to the south side of the county bridge, on the township line. The county bridge was situated on the township line between 30 and 31, and across Buena Vista Slough; that was at Cole's or Cole's Bridge, as it is called. December 26th I sent Ober there; I constructed a levee there, and built a dam across the slough to keep the water from going back into the lake. The water that emptied from Kern River through that channel that I described a little while ago, flowed back into the lake, and my object was to stop that flow; I stopped it for a time. That dam was completed in January, 1876; I mean the dam at Cole's Crossing. Prior to the construction of this dam at Cole's Crossing I went down there to the place where it was constructed; there was water there then; it was running to the lake—was running into the lake, and that was what led me to the conclusion that the dam would stop it. The dam was completed in January, 1876, and remained for a time—until March.

"Q. What became of it in March, 1876?

"A. It broke. I cannot tell you how it broke. I suppose the water broke it. That was the supposition, at least. The water raised outside five or six feet higher than it was on the lake side, and the dam gave away, and the bridge sank in the middle. After it broke I did not reconstruct it. When I constructed that dam, I constructed it south of the bridge. There was a road running across this bridge; the county road; it followed from the uplands clear through on that township line where the road was laid out to go on the west side. There was a levee there, previous to my constructing it. There was a levee thrown up from the end of the bridge back to the high land. There was some thrown up on both sides. The west side came in further, near the bank, the bluff bank.

"Q. How far back from the bridge eastward did that levee extend?

"There was more or less work done for a mile." (T III., fols. 655 to 659.)

G. K. OBER (for defendant):

"Q. Do you know anything about where Cole's bridge is?

"A. Yes, sir, I have been there. I was first there in December, 1875, putting in a dam across the slough. I was in the employ of W. H. Souther.

"Q. What did you put a dam across the slough for?

"A. To keep the water from going into Buena Vista Lake from Buena Vista Slough.

"Q. How was it running when you went there?

"A. It was running south into the lakes.

"Q. How did you put the dam in?

"A. By getting turf and throwing it off the bridge into the water. There was a bridge there then.

"Q. Was there any levee connecting the bridge with the high land at that time?

"A. There was a levee running something over a mile nearly east—in an easterly direction from the

“bridge. There were five men at work on this dam at the time I was there.

“Q. Was the dam easily constructed?

“A. No, sir.

“Q. How long were you at it?

“A. In the neighborhood of one month.

“Q. How high did you carry it above the mark of the water when you first constructed it—about?

“A. I think between six and seven feet.

“Q. Did you succeed in perfecting a dam and keeping the water out?

“A. We stopped the water at that time. (T. III, f. 1149 to 1152.)

WILKINSON:

“In March, 1876, the bridge washed away, and we were sent down there by the Board of Supervisors to see the condition of the bridge and make a report.” (T. III, f. 328.) “There had been thrown up across the slough, right on the south side of the bridge, a dam of sod, and this dam had given way in the place, probably ten or twelve feet wide, and the water was going through there with terrible velocity. A large volume of water was there running south into the lake. It was three or four feet higher on the north side than it was on the south. The water was running through the levee at a point before we got to the bridge, at the east end of it; it had broken through in several places. I have no idea of the flow of water passing through there; but there was a good large stream. The most easterly break was probably a mile or a mile and a quarter this side of the bridge” (fols. 334 to 336).

WILLIAM McFARLAND (for defendant):

“I saw Buena Vista Slough at Cole’s Crossing in the spring of 1876. I was appointed by the Board of Supervisors to go down and examine that levee and bridge there, to see what caused the damage. N. R.

“Wilkinson was appointed with me. We made an examination of that bridge, pursuant to that order of appointment, and made a report of our examination. (T. IV, f. 1481.)

“Q. What caused this injury to this bridge, according to your observation at that time?

“A. The dam being placed across that Buena Vista Slough and obstructing the water from running into the lakes. It stopped the water from running south into the lakes. We found that Souther was the man that caused it to be done. He had put a dam across and turned the water away, obstructing it from running south into the lake, and this had caused the injury to the bridge by ponding the water up on the north side.

“Q. How did that happen? Did it interfere with the natural force of the water, that dam?

“A. Yes, sir; it kept the water from running into the lake. The way it always used to run at that point.

“Q. Was that the natural course of the water to run into the lake, at the time that dam was constructed.

“A. Yes, sir. It broke through and run over, and caused the damage to the bridge.

“Q. How high did you observe the water ponded up on the north side of that point, or that it had been?

“A. I think it was somewhere between three and four feet higher on the north side than it was on the south side.” (Fols. 1484 to 1486.)

JOHN O. MILLER, (for defendant):

“I have lived down on Buena Vista Slough on Sec. 24, T. 30, S. R. 24. I went there the 25th day of December, 1875, and lived there until April, 1876.

“Q—Did you have occasion to notice the water rising in the river or not in the spring of 1876?

“A—Yes, sir; there was, and also in the slough. It

“flooded a part of the crops that I had in on that occasion by the rising of the back water from Buena Vista Slough. The cause of that was that there was more water than the slough could carry, and it flooded the adjoining lands. This was in March, 1876. There was more water come down the river than Buena Vista Slough could carry. There was a dam across the slough by the county bridge, or Cole's Bridge, and the water could not get through there.

“Q—Do you know whether it dammed up on the north side of that levee and dam—whether the water banked up on the north side?

“A—Yes, sir; it backed up on the north side; it must have been five or six feet higher than it was on the south side.

“Q—Did you take any steps to relieve that condition at that time?

“A—Yes, sir, I did. I got some giant powder to blow out the dam with, but before I blew it out the dam bursted. I suppose the pressure of water on it was what bursted it. After it bursted the adjoining lands were relieved of the overflow. I saw the water pass in through there after it burst, in considerable quantity. It was going south in that slough that the bridge was on, towards Buena Vista Lake, in a very considerable quantity. It was not exactly full, but it was rushing through with considerable incline by the bridge. The bridge had caved, and it was rushing under that with considerable force. The washing away of that obstruction relieved the land from the overflow. I don't recollect within what time exactly. The water did not remain long enough to kill the grain it was on. I suppose it must have been two or three days that it was on there. It was a speedy relief. The relief was so quick that it didn't kill my grain.” (T. III, fol. 793 to 797.)

In the fall of 1877 the Kern Valley Water Company reconstructed the dam at Cole's, and, in connection therewith, constructed a levee extending westward to the bluffs or high ground, and running eastward from said dam about a mile and a quarter. (Finding 68.)

This fact is not disputed.

S. W. WIBLE (for plaintiffs):

"In 1876 I was employed on the works at the slough
 "—employed by Mr. Livermore. He was at that time
 "acting for the Swamp Land District, No. 121. After-
 "wards I was employed by the Kern Valley Water
 "Company, which, I believe, was an incorporated com-
 "pany. I was Superintendent of the works—of the
 "canal. At that time I had charge of the building of
 "the canal. I had nothing else to do for that district—
 "nothing but to build that canal, or superintend its con-
 "struction. I had nothing else to do for either the
 "Swamp Land District or the corporation, except su-
 "perintending that branch of the business and works;
 "that general business; the whole thing.

"Q. What was the whole thing? What did it con-
 "sist of?

"A. Well, the construction, and the general manage-
 "ment of the whole thing." (T. II, fols. 1840-41).

"Q. During all that time, from 1876 to the present
 "time, for either one or the other of those companies or
 "employers, didn't you do anything else except the at-
 "tending to this canal?

"A. It was all in one connection with that work, sir.
 "I didn't consider there was any other work not in con-
 "nection with that canal.

"Q. Was there not a dam put at Cole's Crossing?

"A. There was a dam put in at Cole's Crossing, in
 "connection with it. I consider that the same work, in
 "connection with it. That was all done at the same
 "time and under the same administration. That was
 "built in 1877.

"Q. Why do you say you considered the dam the same as the canal?

"A. That was the same swamp land district. That was within the swamp land district, that dam was.

"Q. So was the canal.

"A. I don't know. It is not in the swamp lands it is constructed; but was for the purpose of the reclamation works.

"Q. What reclamation works?

"A. Well, that canal.

"Q. How was the dam for that purpose?

"A. That dam was to prevent the water from overflowing the lands, and also to let the water out in case they did overflow.

"Q. Let it out of where, and into where?

"A. These lands surrounding Buena Vista Lake.

"Q. This dam was to let the water out of Buena Vista Lake?

"A. Yes, sir; or to let it in, either way. It was both to keep it from going in, and to let it out.

"Q. You built the dam there to keep it out?

"A. Yes, sir.

"Q. You didn't build the dam there to let it in, did you?

"A. Yes, sir; if they wanted it in there, to let it in?

"Q. How did the dam assist in letting water into the lake?

"A. I had constructed a head-gate there—a head-gate in the dam, in the levee.

"Q. But without any dam there at all, the water would have gone in, wouldn't it?

"A. Yes, sir; probably more than we wanted.

"Q. The dam in no way assisted the water to get into the lake?

"A. No, sir; nor the head-gate either.

"Q. Then you don't mean that you built that dam for the purpose of making the water go into Buena Vista Lake? You only built it to keep it out, didn't you?

"A. Yes, sir; to keep it out, and if it got in, so as to
"let it out.

"Q. How would it get in there if you built a dam
"to keep it out?

"A. Well, not at all. It didn't get in enough to run
"out." (T. II, fols. 1843 to 1848.)

"Q. Why was it that you wanted to build this dam,
"so as to keep the water from going into Buena Vista
"Lake at Cole's Crossing there?

"A. Well, the swamp lands bordering on the lakes.

"Q. Was the object, then, to reclaim the land—to
"keep the water off the land on Buena Vista Lake?

"A. Yes, sir; around Buena Vista Lake.

"Q. Was that the only object?

"A. Yes, sir; to reclaim those lands.

"Q. Was not the object to make the water go down
"into this canal that you were building, instead of going
"into the lakes?

"A. You could not allow it to go on to the lands and
"reclaim them at the same time.

"Q. Was not that the object?

"A. Yes, sir.

"Q. The object was to make the water go down and
"follow this canal, or get into this canal of yours down
"from your headquarters towards Tulare Lake.

"A. Yes, sir; to prevent the water from running into
"Buena Vista Lake" (fols. 1852 to 1854).

We will see from the testimony of Macmurdo and
McFarland, that the only purposes of this dam was to
keep the water from going to the lakes and to turn it
northward from the dam.

After describing how the dam was constructed, Wible
says:

"The first time when that work was so completed as
"to prevent the water from flowing through from either
"way, was in November, 1877. I then shut the gate.

"Q. How long did it continue in that condition so as to prevent the water running through?

"A. Water could flow through when it rose sufficiently high to run over the top boards. *It did run over.* I forget just how long, till the high water in February, 1878, knocked out the gates on one side. From November, 1877, to February of 1878, it kept the water from going through there at all.

"Q. And the first water that came broke it down?

"A. Yes, sir. Well, no, sir; not the first water.

"Q. Then there was water that could have gone through if it had not been for that gate?

"A. Yes, sir; water came down there in January, 1878.

"Q. How high did the water have to get before it could get over?

"A. Well, I had the gate up. I think the water run over, and then I put in more boards in the gates, and raised the water higher. That was in January, 1878, I put the boards in. I put enough boards in there so that it did not run over until the flood came there. I should think *the water would have to get SEVEN feet high before it would run over after I put the last boards in;* or probably not more than six feet above the water line, after I constructed the gate. *I think about 12 feet of water stood on top of my ground floor.*

"Q. When the flood of 1878 came and broke that dam, which way did the water come, the flood to break it down?

"A. It came down Kern River.

"Q. It went south?

"A. Part of it went south after it broke, and flowed through south into the lake. (Fols. 1926 to 1929.) After the break I closed it up. Since February, 1878, no water has got out of the lake into the slough. (Fol. 1931.

"Q. You have never allowed any to go in since then?

"A. No, sir. Well, yes, I let it go in since that. There was some water went in in 1878, but not enough

"to fill the lakes. The lakes never got so full in 1878
 "that the water ran out again.

"Q. How was it in 1879?

"A. No water flowed.

"Q. What was the reason?

"A. No water in there to flow out.

"Q. There was no water coming down the river in
 "1879?

"A. There was little at times. It did not go into
 "the lake. *We had it closed up then and turned the*
"water north, whatever came. Had a dam across, so
 "the water could not go in. There was some water
 "went into the lake by a break in 1880, in the Buena
 "Vista levee. The break was not where the head-gate
 "was—it was just above. It may have been three-
 "fourths of a mile from the gate east. The water ran in
 "there in 1880, but not enough to fill the lakes. I re-
 "paired that break. (Fols. 1932 to 1934.)

J. C. CROCKER (for plaintiff) says:

"The levee was built across the slough at Cole's in
 "1877. I saw them building it. Mr. Wible had the
 "building of it. I think he was the General Superin-
 "tendent of the Kern Valley Water Company." (T. II,
 fols. 650-1.)

"Q. What effect did the building of that levee have
 "upon the water flowing down through Buena Vista
 "Slough?

"A. *It would have the effect to check the water from*
"going into Buena Vista Lake.

"Q. So long as it was intact and complete, it would
 "prevent any water from going into Buena Vista Lake,
 "wouldn't it?

"A. That would depend upon the stage of water in
 "the river.

"Q. At all stages of the river?

"A. No, sir.

"Q. If that dam had not broken—had been kept up

"as first built—wouldn't it have kept all of the water
"out of the lake?

"A. It would have had to run it clear up above
"Bakersfield.

"Q. Why?

"A. Because, when it gets more water than it will
"carry, the river overflows the banks.

"Q. Since that time there has never been such a
"stage, has there?

"A. Yes, sir; one year.

"Q. If that dam was complete and unbroken, has
"there ever been a time when it would not have kept
"all of the water out of the lake?

"A. Yes, sir; I think so, in 1868.

"Q. The dam was not thought of then?

"A. No; but I say the river at that time carried
"enough water.

"Q. I am asking you about since the dam was built.

"A. I beg your pardon. I have seen the water run
"across there.

"Q. You have never seen such a stage of water since
"the dam was built that that dam would not have kept
"it out?

"A. Yes, sir; in 1880, I think" (fols. 652 to 655).

On redirect-examination, Crocker is asked:

"Q. Would the construction of that levee in any
"manner interfere with the water running down Buena
"Vista Slough?

"A. No, sir.

"Q. What effect would it have upon the waters run-
"ning in Buena Vista Slough?

"A. It would make more water run in the slough. *If*
"the gate was closed, it would make the water run north,
"instead of letting it run south into the lake" (fol. 702).

SOUTHER (for defendant):

"There was a head-gate put in at Cole's bridge in
"1877; and there was work done on Cole's levee at that

"bridge. The old road levee was reconstructed and
 "made higher and stronger. I think that was done in
 "the latter part of 1877. There were two purposes in
 "making that levee; one was for the County road, in
 "order that the travel might pass over it easily, and
 "the levee was thrown up to make a roadway. The
 "next purpose was to hold the water coming down these
 "branches, that I formerly described" (the South
 Branch and the Middle Branch), "from going back
 "into Buena Vista Lake, or to turn them in, as the
 "case might require. This gate was put in, that I speak
 "of—a large head-gate—for that purpose, for the pur-
 "pose of handling the water. That gate was put in for
 "the purpose of letting the waters go into the lake, or
 "of preventing them from going to the lake, or to let
 "them out of the lake, just as the case might require.
 "The water could not be let out of the lakes until it
 "first got into the lake, of course. From my knowledge
 "of New River, and my experience here in this coun-
 "try, New River—all these branches that I have de-
 "scribed, and which we crossed there—came down and
 "ran in right at that point above the bridge, or near the
 "bridge, within a few feet of it, into Buena Vista Slough.
 "It turns and runs back into the lake whenever the
 "water is low enough in these lakes, of course, to
 "allow the water to run. Usually there is a large
 "amount of evaporation over so much territory as these
 "lakes cover. The evaporation is very great; hence
 "they are always low in the fall of the year, and
 "the water continues to flow into these lakes until they
 "are filled to the water level before it turns to run back
 "the other way.

"Q. Then the water of the river there runs into the
 "lakes first and fills them, and then is turned off, you
 "say, from the lakes northward; you didn't say north-
 "ward, but you say the other way.

"A. Well, the other way. Of course the lakes lie
 "to the south and east, and the general direction of the
 "slough leading from this point down to where the

“Kern Valley Water Company's Works' commence,
 “is some four or five miles, and the water turns and
 “runs towards these works, when it comes to find its
 “level back in the lake.

“Q. Until the lakes are full, the water runs to the
 “lakes?

“A. Principally, yes, sir.

“Q. Then I understand you to say that the levee
 “and gate and dam there was constructed with a view
 “for the purpose of turning the waters from the lake,
 “making them run down the other way?

“A. Yes, sir; that was in part to act as a causeway;
 “to handle the water; canals, levees, etc., are built to
 “have command of the water, generally speaking.” (T.
 III, fols. 663 to 668.)

W. R. MACMURDO (for defendant) speaking of the
 dam and weir at Cole's Crossing, says:

“I have had something to do with constructing weirs;
 “I know how they are built generally. I could not say
 “exactly how that one is built at the bridge, that is the
 “part that is under the ground.

“Q. What is the object of that weir, do you know?

“A. I can only say what I suppose. The weir is
 “constructed in such a way that I suppose it is to hold
 “the water from going towards Buena Vista Lake; the
 “rafters are inclined at an angle, and the slope is to-
 “wards Buena Vista Lake, so that the pressure of the
 “water on the side north of the levee would be the
 “proper way; that would lead any one to suppose that
 “that was the way the water was intended to be held
 “against the weir; that the water would be coming
 “from the north; would stand higher on the north side
 “than on the south; the weir has upright sides to it,
 “and the floor made of boards; the portion of the weir
 “to regulate the water is composed of rafters inclined
 “at an angle of forty-five degrees to the plane of the
 “floor; the angle is towards the south; that is, the
 “rafters are nailed to the floor at the north end, the top

“of them further south, so if you stand just north of the
 “weir the bottom will be nearer to you than the top.
 “That leads me to think it was put there for the pur-
 “pose of stopping the water from running southward;
 “for, if the water were to back up on the other side,
 “next to Buena Vista Lake, it would raise the boards
 “right up. If a weir were constructed for the purpose
 “of preventing the water going into the lake or pre-
 “venting it going out, you would have a very different
 “construction from the present weir, I should think; in
 “fact I know it would. It would probably be con-
 “structed with upright posts and boards on either
 “side, so that the water could be held up on either
 “side.” (T. IV., fols. 1188 to 1191.)

W. McFARLAND (for defendant):

“Q. Did you ever see any head-gate about that
 “crossing?” (Cole’s Crossing.)

“A. Yes, sir, I saw it this year. I saw it in 1877,
 “I think, the same head-gate.

“Q. Will you describe how that head-gate is con-
 “structed? Was it an upright head-gate?

“A. No, sir; it was put in, the top part of it, lean-
 “ing to the south, probably at an angle of 45 degrees.

“Q. Have you ever constructed any head-gates?

“A. Yes, sir; that is my business to a considerable
 “extent.

“Q. When a head-gate is constructed in that form,
 “leaning at an angle of 45 degrees, and upward to the
 “south, in what direction is intended to control the flow
 “of the water?

“A. It is to hold the pressure of the water from
 “running against it. If the top is leaning to the south,
 “the water is supposed to run to the south. The pres-
 “sure of water would be from the north side; that
 “would be the natural direction of the water when it
 “leaned that way; it would be to hold the pressure from
 “the north side.

“Q. Suppose the pressure of the water was coming

“from the south side; suppose, in this instance, that
 “the water instead of moving from the north towards
 “Buena Vista Lake—suppose this head-gate had been
 “put in there to prevent the water, or controlled the
 “water from running from Buena Vista Lake northward,
 “what utility would it have for that purpose?

“A. The rafters would have had to run the other
 “way, or else be square—perpendicular before it would
 “be safe. It might have controlled it, but it would not
 “have been safe. The pressure of the water would
 “have lifted it up.

“Q. Would not the pressure of the water have
 “washed the boards out?

“A. Yes, sir; lifted it right up, of course.

“Q. Have you ever known a head-gate constructed
 “to control water running naturally from the south to
 “the north, by having the top of the head-gate lean 45
 “degrees to the south?

“A. No, sir. Any gate of that kind is usually put in
 “straight.” (T. IV., fols. 1486 to 1490.)

SOL. JEWETT (for plaintiffs):

“I was down there in 1878.” (*i. e.*, at Cole’s Cross-
 ing.) “There was a drop in the bridge. The water
 “was passing over the drop in the bridge. I mean by
 “drop, there were boards under the bridge to keep the
 “water from passing to the left. The water was
 “to the right and the boards were to keep it back.
 “That drop was put there to keep the waters from
 “going into Buena Vista Lake.

“Q. Suppose that dam—that drop in the bridge had
 “not been there, what would have become of the waters?

“A. They would have run into the Lakes—Buena
 “Vista Lake and Kern Lake, until they were full, and
 “then run back again. If that drop had remained
 “open, the waters of New River would have run into
 “the Lakes. (T. II., fols. 255 to 257.)

R. L. DIXON (for defendant):

"Q. Can you point out on the map, as near as you
 "can remember, the portions that were overflowed in
 "1876?

"A. I can point out some there where the water
 "came, and to what extent; I don't know that I can do
 "it particularly. The water came up, I first observed
 "it on Section 24; it came from the low slough there;
 "then it came in on the southern part of Section 19; I
 "mean that it backed up out of the slough on to Sec-
 "tion 19. On Section 29 there was an overflow. Sec-
 "tion 30 was nearly all under water; that is, on the north
 "side of the slough. I did not go across, and I do not
 "know to what extent it was on the south side, or the
 "west side of the slough. On the ranch side pretty
 "nearly all of Section 30 was under water, and a portion
 "of 19 was under water. *Section 32 was bound to be*
 "*under water; Section 33 was bound to be under.* I think
 "that overflow was in March—February or March, in
 "1876. It was previous to this overflow of 1876 that I
 "saw the dam completely across Buena Vista Slough at
 "Cole's bridge; I don't know how long that remained
 "there. From my knowledge of the country I do not
 "think it would have overflowed had the dam not been
 "there." (T. III, fols. 517-18.)

This overflow in 1876 is the same mentioned by Miller.
 Dixon then describes the overflow of 1878:

"There was another overflow in 1878; that was in
 "May.

"Q. What was the extent of that overflow in 1878?

"A. All of Section 24, to the levee, was under; that
 "is, the levee on this map H—the levee of the Kern
 "Valley Water Company. The whole of that Section
 "(24) was under. The water also ran across 19. I can-
 "not tell you how much of 19, but my judgment was
 "there was more than half of 19 under.

"Q. More than half of 19, according to the line you
 "are pointing, going very nearly diagonally across?

"A. Yes, sir; it also ran up in what you asked me to designate as Gage Slough, up past the center of Section 20, on that slough, backed up there beyond the house, going eastward along what they call the Gage Slough. In checking my land I had put a check on the south line of Section 20. It lay against that and up to 29, and stopped at the salt grass ridge. All of Section 30, as far as I could see, was under water. I could not state about the west side. That portion of the Section 30, east of the slough, was bound to be under. Section 29, all except the salt grass ridge, was under. The salt grass ridge is on the northeast corner of the section. It was all over section 28, and all over 29, and all over 27. I could not see 34, 33 or 32. That was down the slough. *They were bound to be under when the water was over the others; it was bound to be.* From my knowledge of the country about Sections 32 and 33, and around there, they were bound to be overflowed; they could not help it.

"Q. Do you know whether there was any dam across Cole's bridge at that time?

"A. The levee was there up at the bridge. Whether the levee was completed under the bridge, or at the head-gate, or whatever was there, I don't know; but it was stopped; when I saw it, it was already stopped up, so that the water flowing down Kern River could not go south from that point.

"Q. Could not go into the lake. From your knowledge of the country, from having seen that levee, bridge, dam, etc., had there been no levee, no bridge, and no dam there, would there have been that same overflow?

"A. I don't think so, sir; I do not think it possible it could be to that extent. From my knowledge of the country—I have never run any levees—it would go into the lake.

"Q. I am speaking of your general knowledge of that country.

"A. *It would flow south into the lakes—Buena Vista*

"*and Kern lakes.* I make my answer on that from my
 "knowledge of how I see the water flowing." (Fols.
 "519 to 524.)

Again, DIXON says:

"I had seen that levee at Cole's this year, in April.
 "It is open at Cole's bridge.

"Q. Have you seen generally the amount of water
 "that is coming down the river at this time, since that,
 "during April and May?

"A. I saw it before, and I have seen it since; I have
 "crossed the river several times before and several
 "times since I saw the break in the levee at Cole's
 "bridge. I first saw it about the middle of April, 1881.

"Q. Then you know generally, I understand, the
 "quantity of water that has been flowing in the river
 "about these times, at present; were that bridge closed,
 "that levee at Cole's bridge closed, from your informa-
 "tion of that country, your knowledge of the condition
 "of the water, etc., could you say that any portion of
 "that land would now be overflowed?

"A. Yes, sir; it would overflow some of my land. I
 "think that opening in the levee is what prevents an
 "overflow there at present." (Fols. 528-9.)

WALTER JAMES (for defendant):

"I was at Cole's bridge in the latter part of April, 1878;
 "the water was very high at the bridge in the slough,
 "north of the bridge; south of the bridge the water
 "was very low; lower than I had ever seen it.

"Q. Why was the water higher at the north than at
 "the south?

"A. The levee was constructed across the slough,
 "excluding the water from the lake; north of the levee
 "the water seemed to be spread out all over the country,
 "the levee held it up higher on the north than on the
 "south side; there was a dam across the slough; it pre-
 "vented the water from flowing down the slough; it

“stopped the water entirely at that time from flowing
“into the lake.” (T. III, fols. 164-5).

Again:

James having described the course of the waters of New River as he found it in April, 1881, and having testified that all those waters discharge into Buena Vista Slough at a point near Cole's bridge (T. III, fols. 171-2), is asked:

“Q. What becomes of that water then at the slough?

“A. The greater portion of it flows into the Buena Vista Lake; the other portion goes northward. The levee is still there, but a portion of it is carried away, and a portion remains. (fol. 173).

“Q. Have you examined the country around there?

“A. Yes, sir; I have seen the levee and know the general condition of the country north and south of the levee; I have examined it; there is a difference in the elevation between the north and south side of the levee at Cole's bridge; the cause of this difference is the filling up of the slough north of the bridge; this has been caused by the flow of water being stopped at that point; the deposit from these channels of the river has filled up the slough. (fols. 174-5).

“Q. Now, Mr. James, if the levee had never been placed there, this accumulation of sand, you say, formed there by the levee, what would have been the course of the water after reaching that point?

“A. *It would flowed into Buena Vista Lake.*

“Q. At all times or conditions of the lake?

“A. Until the lake would become filled up. After the lake was filled then it would flow the other way. I do not wish to state that any possible head of water that would come down the river would always necessarily flow that way. A large head of water would flow another direction.

“Q. What do you mean by a large head of water?

“A. Some water—

"Q. [Interrupting.] I am speaking of the ordinary flow of the river.

"A. The ordinary flow of the river, at ordinary stages of the water, it would flow towards Buena Vista Lake until the lake was full." (Fols. 179 to 181.)

J. D. SCHUYLER, called as an expert by defendant, testified:

"I am a civil engineer; I am the chief assistant of the State Engineer.

"Q. As the chief assistant to the State Engineer what are your duties?

"A. Thus far they have been to make a general study of the problems of irrigation throughout the State; the different irrigation districts which have required work of various kinds and character" (T. III, f. 1058). "I have examined Kern River generally from where it emerges from the cañon to where it enters Buena Vista Lake. Its general course is southwest.

"Q. Where does the river empty?

"A. It is now emptying into Buena Vista Slough; from there a portion of it runs into Buena Vista Lake, and another portion of it goes northward.

"Q. Have you at any time been in the vicinity of Buena Vista Slough—in the vicinity of where this water empties?

"A. Yes, sir; I was there once or twice in 1879; I have been there since; I was first there in February, 1879; I was then along the slough from Wible's headquarters up to the lake, southward, and along through the lakes. The water was not then flowing; it was in February. I have since been in the vicinity of the point in the slough where the river emptied into the slough. I have been to Cole's bridge and seen the water there; it was during the last month—April, 1881.

"Q. During the past month, which way was the water flowing at the bridge?

"A. The water was flowing under the bridge, southward.

"Q. Under the bridge, was the flow of the water free?

"A. There was an over-fall at the bridge; there was a great deal of fall. The water was not altogether unobstructed. I saw a levee at that bridge.

"Q. From your general knowledge of the river, and of the conditions there at that bridge and vicinity, what, in your opinion, would be the course of the river had that levee and bridge never been placed there at Cole's?

"A. From what point do you speak of?

"Q. Take the course of New River.

"A. I should judge that the water would first seek Buena Vista Lake, and after filling the lake it would also fill up Kern Lake—back water. The general preference of the water seems to be to go in that direction; that seems to be the line of the greatest declivity from the river.

"Q. Now, placing the obstructions there, placing the levee and bridge at that point, assuming that the water came down through those south channels shown on this map I, what would be the result—what would be the result from the obstruction being placed there, in your opinion?

"A. The first result would be to cause a deposit of whatever material the water was carrying, or a portion of it; and the water not being able to go southward, it would all be forced northward towards Tulare Lake. Kern River carries a very considerable amount of deposit, either in suspension or rolling along the bottom, and if the velocity were checked at the bridge by any obstruction in the channel, the tendency would be to deposit the material it was carrying, and it would have the effect of building the slough up at that point, by diverting the waters northward, they would naturally having freed themselves from the materials they carried in suspension, they would have power to take up more material and scour out the bed further on its way north.

“Q. Now, Mr. Schuyler, assuming that in its natural condition, there was about the middle of Section 29, T. 30, S. R., 25 E., across Buena Vista Slough, a higher point, a higher elevation, than at any other point further south, in its natural condition, and you place an obstruction across the slough, south of where the waters empty into the slough from the river, a complete obstruction to the river, a levee, dam or whatever it might be, and cause the water to turn northward, you have stated that there would be a deposit formed, I understand you, in the neighborhood of that obstruction?

“A. Necessarily.

“Q. What effect, if any, would it have upon this higher point in the middle of the slough, this point I designate as in Section 29, further north?

“A. The obstruction would force the water to flow northward over this high point that you suppose to be in Section 29; the effect of the water flowing over that point would rather be to cut it down to some extent, depending altogether upon the fall below there.

“Q. I understand you, then, to say that in that condition of affairs, assuming that the waters came down this south branch and found an obstruction there which prevented them from running to the lakes, checked them completely and forced them northwards, and that there were a higher point in this place, that I designated in the middle of Sec. 29 on the slough, than the original point where the levee or obstruction was placed, the tendency would be to raise the bed at the levee at the obstruction and to cut it out and deepen it at the other point?

“A. Yes, sir; that would be the natural tendency.”
(T. III, fols. 1064 to 1073).

COL. GEORGE H. MENDELL, also called as an expert for defendant, speaking of the dam at Cole's Bridge, is asked:

"Q. Is such a work calculated to obstruct the flow of the water at all?

"A. Yes, sir. It encroaches on the natural water way.

"Q. Suppose that there were a dam thrown across the slough at this point that you speak of, Cole's Bridge, and the channel completely obstructed there, what, from your knowledge of the country, the formation of the country, etc., would be the result of such a work?

"A. Well, that water which now runs through that channel of Buena Vista Slough, past Cole's Bridge into Buena Vista Lake, being no longer able to go there, would be obliged to take a northerly direction towards Tulare Lake.

"Q. Would such an obstruction have any effect upon the channel itself?

"A. It would have an effect, yes, sir; *the tendency of an obstruction of that kind in forcing this water to go to the north would be for that water to make a channel for itself in going to the north, and to enlarge the existing channel, if that channel had not been accustomed to carry that quantity of water, now being called upon to carry it, the tendency would have been to enlarge this channel, that it would have followed towards the north.*

"Q. How about that to the south?

"A. Well, *that portion to the south, between that and the bridge or levee that you suppose to be there at the bridge, the tendency there would be the opposite, the converse; the tendency right at that place would be to cause a deposit in case the river is a sediment-bearing river—bearing down sand and other sedimentary matter. That would become in there a quiet place; the direction of the current being off in the other direction, this being a low place and there being no current in it, would naturally become a place of deposit for the sediment that was in the water; a quiet place. So the tendency there would be to fill that place between the bridge and the mouth of the river, and then changing the course of the stream as it flows to*

"the north below there, the tendency would be to enlarge the channel.

"Q. You say the tendency of a sediment-bearing stream; do you know whether this Kern River is such a stream as that?

"A. Yes, sir; it bears sand. The view I have given with regard to the formation of this delta indicates that, so I consider that it is a stream of that character.

"Q. So an obstruction placed across any part of the channel of the river, or of the slough, would have the tendency, you say, to build it up?

"A. Yes, sir; and to cause an enlargement of the channel in the other directions." (T. III, fols. 985 to 990.)

Col. Mendell and Mr. Schuyler both testified that the natural result of the obstructions placed at Cole's Crossing would be, first, to turn the waters northward; second, to cause a deposit in and filling of the channel at that point, and at the same time deepen and enlarge the channel further north; and Walter James testifies that the channel has actually been filled up just north of Cole's Bridge.

Now let us see how much filling has been done at the one place, and how much cutting away at the other.

R. L. DIXON (for defendant), in October, 1875, crossed Buena Vista Slough at what he terms his Hog Camp Crossing, which was about fifty yards north of the mouth of what he calls the North Branch of New River (designated by other witnesses as the Middle Branch); he says:

"At that time the Slough was something like thirty or forty feet wide; the bottom of the Slough at that time was not more than one or two feet below the surrounding country. I don't think it exceeded two feet. I think if you put two feet of water in there it would overflow its banks." (T. III., 495-6.) "I have seen this point on the Slough,

“which I call my Hog Camp Crossing, of late date; I
 “have seen it frequently of late; I last saw it during
 “the month of April, 1881. *The channel is now much*
 “*deeper there, and I think it is wider; I think it is nearly*
 “*one-third wider than it was when I saw it in October,*
 “*1875: I think it is all of four feet deep now, may be*
 “*deeper; I think now it will carry four feet of water*
 “*without overflowing its bank.*” (Fols. 497-8.)

MACMURDO (for defendant) ran a line of levels along the Slough from the head-gate of the Kern Valley Water Company's Canal. Says he:

“I assumed the elevation of the floor of the head-gate
 “at the Kern Valley Water Company's canal to be 100
 “feet, as marked on Map H, at the extreme northwest
 “corner of Section 15; that was the floor of the head-
 “gate below the general bottom of the canal on the upper
 “side of the gate; the general bottom of the canal was
 “a little over three feet higher; three feet and a frac-
 “tion; the elevation at the point where the canal leaves
 “the slough on Section 14, was about 104; I don't re-
 “member exactly what was the elevation at the mouth
 “of Gage Slough; it was 108 and a fraction; less than
 “109 and more than 108.

“Q. Do you remember what the elevation was at
 “the mouth of the middle branch in the slough?

“A. It was 109.8.

“Q. Do you remember the elevation in the mouth
 “of the middle channel of Kern River?

“A. No, sir; I don't remember it; it was 113 and a
 “fraction in the mouth; it was higher than the bed of
 “slough. Just north of Cole's Bridge the elevation is
 “111 and a fraction; 111.3 I think; just south of Cole's
 “Bridge it is between 103 and 104; I don't remember
 “the fraction exactly. (T. IV, 1192-3.)

Why is it that the slough just north of Cole's bridge is now 111.3, whilst just south of the bridge it is 103 and a fraction—a difference of more than seven feet—un-

less from the sands and sediments deposited there by the water being turned north? There is no other possible way to account for the difference. We then have it that from the bridge to the mouth of the Middle Branch there is now a decline *northward* of a foot and a half, whilst prior to the construction of the dam at Cole's the decline must have been at least nine feet *southward* from the mouth of the Middle Branch to the bridge.

But notwithstanding these obstructions at Cole's crossing, notwithstanding even the fact that the grade of the slough has been so changed as to now decline northward where in former years its decline was to the south, it seems that the waters of New River are still striving to reach the lakes; that year after year, since the dam and the levee were placed at Cole's, the waters of the river have broken through these obstructions, and until again obstructed resumed their flow to the south. As late even as April, 1881, the greater portions of the waters which reached the bridge—the dam being broken—were passing to the lakes.

GEORGE DAVIDSON (for plaintiffs) made certain measurements of the flow of the water in the vicinity of Cole's. He says:

"I found there was a little more than 400 cubic feet passing per second towards Buena Vista Lake, and there were a little over 300 going northward." (T. II, f. 1480) "These measurements were made yesterday" (f. 1505); that is, April 21st, 1881.

GEORGE H. MENDELL (for defendant) also measured the flow of the water at Cole's upon two different occasions, the first on April 17th, 1881, and the second on April 30th, 1881. (T. III, f. 1015.)

"Q. When you first made those measurements what amount of water did you find running south to the lake, at this point you mentioned?

"A. I found about 370 cubic feet per second.

"Q. And what amount did you find at the ford to the north?

"A. Just about half that, almost exactly half of it; that would be 185 cubic feet per second. That was on the first occasion." (Fol. 993.)

The measurements on the 30th of April were made at the same points as those made on the 17th.

"On the 30th of April," says he, "there were 438 cubic feet per second going to the north and 567 feet going to the south." (fol. 1018).

Now, a word from the experts as to the natural drainage of the waters of Kern River.

On his direct-examination, PROFESSOR DAVIDSON says:

"Kern River is at the head of what we call, in the U. S. Commissioners' Report, a delta, which is formed by the debris brought down by the Kern River. It has spread out, fan like, from a direction east of south to a west southwest direction, and terminating on the borders of the lakes Kern and Buena Vista." (T. II, f. 1473).

On cross-examination:

"Q. What I want to get at is whether or not you can tell—I do not know whether it is possible for any body to tell whether there has been a time when none of the waters of Kern River ever ran into Buena Vista Lake at all?

"A. I think not, because the grade of the country would be against it.

"Q. Do you think it impossible that there ever was such a time?

"A. I think not.

"Q. Do you pronounce it a physical impossibility?

"A. I should think it was almost physically impossible from my examination of the country and my knowledge of the country.

"Q. That there ever could have been a time when

“none of the water of Kern River ran into Buena Vista Lake?”

“A. No; I have not said that. I said that in my opinion I cannot see how it is possible that there was a time when they would not.

“Q. You say that it is a physical impossibility that there ever could have been a time when none of the waters of Kern River would have gone into Buena Vista Slough?”

“A. We misunderstand each other. I think it has always been the line of drainage down into Kern Lake and Buena Vista Lake. What I am trying to say is this: that they must always have gone into Kern and Buena Vista Lakes except there was some exceptional physical reason why they were diverted temporarily further to the west.

“Q. Artificially?”

“A. It might be artificially or naturally. Understand me I am not catching at any words.

“Q. Nor am I. I do not want to do it.

“The Witness. I mean this as an engineer; I might block up the channel of the river and throw its waters in another direction.” (Fols. 1495 to 1498.)

COL. MENDELL (for defendant), having described the general features of the “Kern River Delta,” lines of declivity, etc., is asked:

“Q. Then I understand you to mean that the natural line of this water is towards the Lakes?”

“A. Yes, sir; the slope of the ground, the slope of country determines that. I consider that the natural drainage.” (T. III., fol. 982.)

J. D. SCHUYLER (for defendant):

“Q. From your general knowledge of the river, and of the conditions there at the bridge and vicinity, what, in your opinion, would be the course of the river had that levee and bridge never been placed there at Cole’s.

"A. From what point do you speak of?

"Q. Take the course of New River.

"A. I should judge that the water would first seek Buena Vista Lake, and, after filling the lake, it would also fill up Kern Lake—back water. The general preference of the water seems to be to go in that direction; that seems to be the line of the greatest declivity from the river." (T. III., fol. 1067.)

We have now shown :

1st. By the testimony of Macmurdo (what seems, however, to be an admitted fact), that the waters of New River continue in one channel until they reach a point in Sec. 23, T. 30 S., R. 25 E., where the south and the Middle Branches fork.

2d. By the testimony of Walter James, James Dixon, R. L. Dixon and L. L. Dixon, that the so-called North Branch or Gage Slough is not a branch of New River, and does not constitute a water-course.

3d. By the testimony of Macmurdo, James, Wible, Davidson and Jewett, that all the waters of the river which now flow into either the South Branch or the Middle Branch at the point of separation in Sec. 23, again unite at or near Cole's Crossing.

4th. By the testimony of these last named witnesses, together with that of Souther, Conner and L. L. Dixon: first, that the course just described has been the accustomed flow of the waters of both the South and the Middle Branches from at least as far back as the 3d day of March, 1874; and, second, that it is only in times of very high water that any waters, even from the Middle Branch, flow into or continue through the shallow channel shown in yellow on Map H, or to or into Buena Vista Slough at a point in Section 30, T. 30 S., R. 24 E. or at any point other than the point known as Cole's Crossing.

5th. By the testimony of James Dixon, R. L. Dixon, Souther, Conner, L. L. Dixon, Jackson and McLean, that the greater, more usual and accustomed flow of the

waters of New River is and has been into and through the South Branch in preference to the Middle Branch.

6th. By the testimony of James Dixon, R. L. Dixon, Souther, Noble, Jackson, Dumble, McFarland, McLean, Barnes, Pensinger, Ober, Wilkinson, Miller, Sol. Jewett, Crocker, Wible, Macmurdo and James, that the waters discharged into the slough near Cole's Bridge, in their natural flow, flow southward to the lakes.

7th. By the testimony of James Dixon, R. L. Dixon, Souther, Jackson, Dumble, McLean, Barnes, Pensinger, Miller, Crocker and Jewett, that all the waters of New River, whether flowing through the South Branch to Cole's Bridge, or through the Middle Branch to Section 30, after reaching Buena Vista Slough at whatever point, flow in their natural flow southward to and into Buena Vista Lake.

8th. By the testimony of Walter James, Macmurdo and R. L. Dixon, that the placing of the artificial obstructions at Cole's Crossing has, by filling up the channel at that point, and deepening and enlarging it at a point north of the mouth of the Middle Branch, changed the downward grade of the slough and caused it to now bear northward from Cole's Bridge, instead of southward from the mouth of the Middle Branch, as it did prior to such obstructions.

9th. By the testimony of Prof. Davidson, Col. Mendell and Mr. Schuyler, as experts, and of all the above named witnesses as to facts, that the natural drainage of Kern River is to and into Buena Vista and Kern Lakes.

Many of the witnesses whose testimony we have above quoted state that the waters of New River flow through Buena Vista Slough southward to the lakes *until the lakes are full, and then flow back again*. Thus far we have made no comment upon the waters *flowing back again*, for two reasons:

1st. Those waters which "flow back" only do so after having become still and stationary in the lakes; their continuous flow has been interrupted, and they in

no manner constitute a water-course or regular flowing stream. At best this "flowing back" is but of the surplus waters of the lakes which, in times of flood or freshet, overflowing, drain slowly northward to the swamp.

2d. These overflows are rare in occurrence, and generally small in amount, as we shall hereafter show under the heading of ~~"Overflows."~~ *"Buena Vista Slough"*

Buena Vista Slough.

CROCKER (plaintiff), on his direct examination, swears, in substance, that Buena Vista Slough is a continuous stream or water-course, from Buena Vista Lake through the swamp to Tulare Lake, flowing in places in one channel, in others in two, and in others again in three. But Crocker is a ready swearer. He swears either or both ways, as circumstances dictate or his interests prompt. He swears that there was a continuous flow of water through the swamp during the whole year 1871 (T. II, fols. 490 and 549-50); then he swears there wasn't (fol. 569); and then again he swears there was (fols. 611 to 614). He swears that the first time he ever saw the slough without any water running in it was in 1876 (fols. 490-1 and 507); and yet he swears it was dry in 1871. He swears, the first year he ever pumped was in 1876 (fol. 510), and then he swears, he pumped in 1871 (fol. 714). He swears that the waters of the Middle Branch of New River run south (fol. 525), and then he swears they run north (fol. 526). And so with Buena Vista Slough. Your Honors will see from an examination of his testimony, that though he first swears that there is a continuous channel throughout the swamp, he still, with his usual versatility, swears that there is not.

CROCKER is asked:

"Q. How deep are the banks of Buena Vista Slough, from Wible's Crossing down to Weed Island?

" A. Well, very deep from Wible's Camp down to Weed Island. I think it will average in the neighborhood of fifteen feet.

" Q. *Is that a continuous slough or channel, from Wible's Camp down to Weed Island?*

" A. No, sir, not quite to Weed Island.

" Q. *How far from Wible's Camp does a continuous and well defined slough extend north?*

" A. *I think 3 miles or 4—3 miles.*

" Q. What is the depth and height of the sides of the slough during those 3 miles?

" A. Well, that is the deepest portion I speak of. I should judge from Wible's Camp down there, three miles—I should judge *the deepest of it, in the deep holes, taking it along there, in my judgment, would average about 15 feet.*" (T. ~~IN~~², fols. 575-6.)

" How deep were the banks—the deepest there, that is what we started to get at—along there from that point down to Weed Island?

" A. I believe there are places there where it would be, from the bottom to the surface, 20 feet.

" Q. For that distance of 3 miles, where you say it is well defined, what is the shallowest bank in the whole slough in that three miles?

" A. *I think it runs out as you go towards it; the nearer you get to Weed Island the shallower the banks get.*" (Fol. 582.)

" Q. You told me there was a well defined channel there, from Wible's for 3 miles?

" A. Yes, sir; and the banks in the deepest are 15 or 20 feet deep.

" Q. At the shallowest, how deep is the channel?

" A. I should judge probably 8 or 10 feet, and prominent for that distance; then, probably as you go north, *it runs out.*

" Q. To nothing?

" A. No, sir; not entirely to nothing.

" Q. What is the depth of it at the end of that 3 miles—the depth in the channel?

" A. *It is more of a depression than of a channel where I spoke yesterday of the drift-wood blocking it up. There is no drift-wood there now.*

" Q. There is no channel to the end of that 3 miles, going north?

" A. Yes, there is a channel; there is a channel that is cut out on both sides of the slough.

" Q. Cut out; has it any banks?

" A. Yes, sir.

" Q. How wide apart?

" A. I could not tell how wide they are.

" Q. How far apart are the two banks of that channel, if it has any banks?

" A. It is cut out in places.

" Q. I am speaking of the bottom of that three miles in the Old Slough that runs down you say three miles, and is a well-defined slough with high banks. At the end of that where it ceases to be well-defined, how wide is the distance between the banks, if it has banks, below that?

" A. I should suppose it to be—the slough is wider after you get right to this low place where the water breaks out; the slough is wider than it is this way.

" Q. How wide is it after you get three miles down and leave the well-defined banks?

" A. That is the place I am speaking about.

" Q. How wide does it get at the widest?

" A. It branches into three sloughs; one runs on each side.

" Q. Are there three well-defined sloughs there?

" A. *In portions of the way there are; in some portions.*

" Q. Immediately after you leave the point where the well-defined slough ceases, do you come to the three sloughs that are stated on this map No. 2? Show me where it ceases to be a well-defined slough on there.

" A. I should think it would be somewhere here (pointing on map). It would be somewhere on Sec.

" 32, I think. Let me see, I said about three miles
 " from the canal camp. It would be somewhat about
 " here (pointing).

" Q. Wherever it is, *it goes down until it ceases to*
 " *have well-defined banks to it?*

" A. Yes, sir.

" Q. Now, at that point just below that point, how
 " wide is it between the two banks, if there are any
 " banks?

" A. There is more of a depression on both sides
 " where the water has cut it.

" Q. *It is more of a depression in the ground than a*
 " *channel cut through the ground? Is that so?*

" A. Yes, sir.

" Q. *Well, it has no banks to it, then?*

" A. *In places it has.*

" Q. *In places it has not?*

" A. *In places it has sloping banks.*

" Q. *It has no banks; just a depression in the ground.*

" A. *No perpendicular banks.*

" Q. *No banks of any kind, has it?*

" A. *It has in places.*

" Q. THERE ARE PLACES WHERE THERE IS NO BANK AT
 " ALL?

" A. YES, SIR.

" Q. There are places where there is a sloping
 " bank on each side, and places where there is a very
 " well defined bank cut right down by the action of the
 " water?

" A. Yes, sir.

" Q. 10 or 20 feet high?

" A. Yes, sir.

" Q. Then there are other places where there is no
 " bank?

" A. No perpendicular banks.

" Q. No bank of any kind?

" A. Yes, sir." (Fols. 582 to 590).

" In going from Wible's down to Weed Island, when
 " the water is taken off there, and the country is per-

“fectly dry, I only found one channel from Wible’s
 “down to Weed Island. *That is, to where it widens out.*
 “*That, I guess, is about three miles.*

“Q. There it has a perfect channel, with well-de-
 “fined banks, and rather narrow?

“A. Yes, sir.

“Q. From that point down to Weed Island, how
 “many channels are there?

“A. From this point where it breaks out?

“Q. Yes.

“A. There are three.

“Q. Where are they on the map?

“A. I cannot tell where they are on the map—on
 “this or any other. I only know from knowing the
 “country.” (Fols. 600-1.)

“Q. From that point, which is just three miles
 “below Wible’s, down to Weed Island, you find three
 “channels in the swamp land?

“A. Yes, sir.

“Q. Wherein do they differ from each other, if at
 “all? Mark you, I am speaking of when they are dry.

“A. I don’t know that they differ materially—the
 “three. Two of them do. The centre channel has
 “got more prominent banks than those on the two
 “sides.

“Q. The centre one has not any banks at all,
 “has it?

“A. Yes, sir.

“Q. How wide are those banks apart again?

“A. *That is the bank below this break?*

“Q. *Yes, sir; I am talking about after you got below*
 “*the break; it has no banks?*”

“A. Yes, sir; it has banks in places, and deep.

“Q. How wide are these banks; how wide apart?

“A. I presume they are very nearly as wide as the
 “slough. They are not half a mile apart, nor a
 “quarter.

“Q. Wherein does that channel below the point

" where it is well defined, as you say, differ from this western channel ?

" A. It differs because *in portions of the way* this has cut through and formed a regular bank. I speak of the western one.

" Q. Then the western channel is well defined and looks more like a water-course than the middle channel ?

" A. No, sir. It carries more water than the middle one, because the middle one was shut up with the drift wood, which turned the water out of it at one time. I think the water will run into this western channel before it will run in the middle one." (Fols. 603-5.)

Now plaintiffs have adopted an ingenious theory for overcoming the break in, and disappearance of the channel at the head of Weed Island, or the point described by Crocker as "three miles below Wible's." They ascribed this ceasing of the channel at that point, to the lodging there of drift-wood brought down by the flood of 1867-8. Crocker, and many others of plaintiffs' witnesses, say that the lodging of this drift-wood at the head of Weed Island filled up the main channel (which they designate as the centre channel—the one running through Weed Island), and caused the water to cut two new channels at that point—one to the east and one to the west. But, unfortunately for them, the plausibility of this theory is destroyed by the testimony of one of their own witnesses as to the condition of the channel through Weed Island as it existed prior to the flood of 1867-8.

F. A. TRACY (for plaintiffs), on direct examination, says:

" From 1863 up to 1867 and 8, there [was an open channel of water running down there.

" Q. How far from the lake was that an open channel from 1863 to 1867 and 1868 ?

" A. It was an open channel down to the centre of Weed Island; and through Weed Island was an open channel.

" Mr. Garber.—Q. An open channel down through the centre of Weed Island?

" A. *Down to Weed Island; through it there was a channel, but it was not well open through it.*" (T. II 954-5.)

" CROCKER.—Q. How is it in the channel that you speak of, in the water—any tules in it?

" A. There are, in places.

" Q. Right in the channel—which is marked down there as the main slough?

" A. Yes, sir; I presume there is. When I saw it there was, when I was there last.

" Q. Any difference between that you call the bed of the channel and the balance of the swamp, as to the growth of tules in it?

" A. Yes, sir; there was a difference.

" Q. What is the difference?

" A. The tules where there is a current of water running down do not grow so thick as where there is no current. Where the current is running tules do not grow until the water comes on.

" Q. Is there any part of the swamp now where the tules do not grow, which you call channel?

" A. I think there is.

" Q. Is it a well defined place, running down north?

" A. Yes, sir; in places.

" Q. *And in places there is no such absence of tules?*

" A. *Yes, sir; there are many places in the channel that no tules grow, and many places where they do grow.*

" Q. Take it over where Kern River comes into the slough, from there down to this canal is there any growth of tules right in the slough?

" A. No, sir; I don't know of any; no growth of tules in there at all. There are tules along outside of the slough, in places; in some places, I presume, a

" quarter of a mile wide. There is no growth of tules
" in the channel there.

" Q. From Wible's down to the head of this Weed
" Island, is there any growth of tules in what is marked
" as the channel on the map.

" A. No, sir; none at all.

" Q. In the swamp land that is marked as swamp
" land on the map, outside of the channel, is it all
" covered with tules?

" A. In places where the water channel is; in places
" there are tules, and other places not. By the channel
" I mean where the main current of water goes.

" Q. I am speaking of the slough, from Wible's
" down to the head of Weed Island?

" A. In the main slough, in the centre of the slough.

" Q. In the centre of the slough you told me there
" was no growth of tules?

" A. Not in the centre.

" Q. Is there any in this slough to the west?

" A. There is none until you get to where this timber
" was lodged. *From there down there is tules growing in*
" *that place, right in the channel of the slough.*" (T. II,
" Fols 641 to 645.)

" Q. How far is it from where the timber lodged
" down to this Weed Island? What portion of that
" distance do the tules grow in the channel—on a straight
" line, without following the bends on the slough?

" A. I should judge you would find tules in different
" places; not all of the way, but in different places, for
" a distance, perhaps, for three miles. I would not be
" positive. Where the tules grow, in most places there
" is a deep quagmire; you cannot get across it. A horse
" would bog right in all through.

" Q. Are the tules growing in this western channel,
" say, from the head of Weed Island down? Do you find
" tules growing in that channel?

" A. You do, in some places." (Fols 648-9.)

" Q. The entire portion of the channel which extends

"from Buena Vista Lake clear into Tulare Lake, how high are the banks at their lowest ?

"A. At the lowest, in some places there would be no banks at all, but this depression.

"Q. Where there are banks ?

"A. There are in many places high banks.

"Q. At the lowest, how deep would they be ?

"A. I suppose some of these banks along there would be a foot deep ; I think they could not be much lower.

"Q. Now, are the banks of the slough or channel generally of the same height as the land adjoining, or higher or lower than the land in the swamp or slough, outside of the channel ?

"A. It depends upon the portion of the swamp ; it is not all alike ; in some places the banks are a great deal higher, and in some places lower ; in many places the banks are higher than the country round, but it is not generally so." (Fols. 681-2.)

"Q. For how long a period have you ever known the water to stand above the banks of the channel, continuously ?

"A. I could not tell you. On portions of it I have known it to stand. *I suppose it stood on the greater portion of it for a considerable length of time ; probably a year or two.* It might have been longer, or it might not have been so long." (Fols. 695-6.)

We submit that this testimony of Crocker as to sloughs through the swamp, conclusively establishes the fact that there is no continuous channel or water-course, with defined bed and banks, further north than "three miles below Wible's."

Now let us see, however, what other witnesses say upon the subject of slough and channel through the swamp.

A. GODEY (for plaintiffs):

"Buena Vista Slough remained the same from 1858
"to 1866" (T. II, f. 128); and from his early knowl-
edge of it, Godey thinks it must still remain the same
as it was then. Says he:

"There is nothing that I can see to change it. If
"you would turn as much water in there now as there
"was at that time it would run just the same as it did
"at that time." (Fol. 128.)

Now what is his description of the slough as he found
it "*at that time*?" He was coming from San Fran-
cisco. "When about half way between Tulare and
Buena Vista Lake," says he, "It was my camping time
and I thought I would water easily by turning towards
the slough, and I went into the tule, damp and dry,
until I got to the slough. *When I got to the slough I got
between two long holes of water, probably a quarter of a
mile long, and a little water running between the two.*
There I camped. I went through the tule there, prob-
ably about two miles from dry land, from the main
road." (Fol. 126).

Such was the condition of the Buena Vista Slough as
Godey found it in September, 1866, (a time of the year
when, as we will show by the testimony of many wit-
nesses, the water would usually rise and flow from one
hole to another), and such, according to this witness,
remained its condition from 1858 to 1866, and on up to
the present day; for, "*there could not be any change;
there was nothing to change it.*"

W. W. HUDSON, (for plaintiffs):

This witness was driving stock along Buena Vista
Slough between 1859 and 1872 or 1873. (T. II, p. 47).
Says he:

"We followed the slough, in order to get water and
"camp."

"Q. Was there any change in that slough between

" the time you first went there in 1859 and the time
 " you were last there in 1872 or 1873?

" A. No material change.

" Q. The channel is the same now as it was then?

" A. Yes, sir." (fol. 185).

" I last saw Buena Vista Slough between Buena Vista
 " Lake and Tulare Lake in 1873, I think.

" Q. When you saw it last, was the general course
 " of that slough, the water running through the same
 " channel as it was when you first saw it?

" A. Yes, sir.

" Q. There was no change?

" A. No, sir. No material change.

" Q. Are the positions of the lakes and sloughs, re-
 " spectively, on this map correctly delineated, accord-
 " ing to your idea of the country? (The witness is
 " shown Map No. 1 to identify it.)

" A. Yes, sir.

" Q. *Is the position of the slough from Buena Vista to*
 " *Tulare Lake correctly delineated there, and the swamp*
 " *lands?*

" A. *Yes, sir, I think it is.*" (fols. 189 to 191.)

We ask your Honor to first look at the picture of Buena Vista Slough, given upon plaintiff's Map 1, which Hudson says correctly represents the channel as he found it from 1859 to 1873, and then compare it with plaintiffs' Maps 2 and 3, which McCray, Wible and others of plaintiffs' witnesses swear correctly represent the channel as it exists to-day.

JOHN BARKER (for plaintiffs):

" Q. I understand that you are familiar with Buena
 " Vista Slough, continuously, from 1854 up to and in-
 " cluding 1859?

" A. Yes, sir; I saw it all of those years." (T. II,
 " fol. 334.) "I visited the Buena Vista Slough again
 " in 1879, two years ago." (Fol. 330.)

" Q. What was the condition of the water then?

" A. Well, there was a channel of water there.

“ Q. The same way?

“ A. Well, about the same way; in a very similar way, as near as I can tell; no material change that I could discover.

“ Q. No material change from the time you first saw it to the last?

“ A. It might have been more or might have been a little less.

“ Q. Of course, very similar. You cannot be accurate about those things. You found the same general appearance?

“ A. Yes, sir.” (Fols. 358-9.)

F. A. TRACY (for plaintiffs), after having described the slough or sloughs in the swamp as they existed from 1863 to 1868, was asked:

“ Q. Has there been any change or material change in the sloughs since that time?

“ A. I think not; none that I remember of.

“ Q. What was the condition of these sloughs when you saw them, from 1863 to 1868, as compared to the last time you saw them?

“ A. There was no material change from the slough to the head of Weed Island in all those years. From where the sloughs come together, after leaving Weed Island, there was no change that I know of in all those years.

“ Q. You say there was no change below that point; was there any change above?

“ A. The water rushed out of the channel that run through Weed Island in 1868, on both sides, more than it had before.” (T. II, fols. 974-5.)

We see from the testimony of these witnesses—Godey, Hudson, Barker and Tracy—that from 1854 to the present day there has been no change in Buena Vista Slough, or the channels within the swamp, except, possibly, the trifling change mentioned by Tracy, at the head of Weed Island. It follows, then, that whatever

be the condition of the sloughs or channels within the swamp at the present time, such must have ever been their condition as far back as 1854, and howsoever water may now flow within the swamp, so must it have flowed, whenever it flowed at all, during all those years.

F. P. McCRAY (for plaintiffs), on his direct examination, states that he made plaintiffs' Maps 2 and 3:

"Q. The channels of Buena Vista Slough, as delineated on Maps 2 and 3, are correctly expressed as they now exist on the ground?

"A. I think so; yes, sir." (T. II, fol. 382.)

Now let us see how correct these Maps 2 and 3 are, and how they were made.

It seems that in December, 1877 (T. II, 387), and January, February and March, 1878 (fol. 395), McCray made certain surveys in the swamp, a portion of which surveys consisted in meandering the slough from the north of the Middle Branch of New River to as far northward as Section 24, T. 29 S., R. 23 E.

At the time of these surveys and meanderings, and from his notes thereof, McCray made Maps "B" and "D." "Map B," says he, "is the only complete map I have made of those surveys." (T. II, fol. 872.)

As to Map D: It was with the utmost difficulty and only after much prevarication and equivocation on the part of both McCray and Wible, that we were able to procure the Map D from plaintiffs. (*Vide* Trans. II, pp. 103 to 105, 117, 118, 214, 217 to 227, 397.) When, however, it was produced. McCray is asked:

"Q. Do you know for what purpose this Map D was made?

"A. I cannot tell you that I know altogether for what purpose it was made.

"Q. You say that in part this was made from your field-notes?

"A. In part, sir.

"Q. I ask you how far the slough that is delineated

“on this map was made from your field-notes? How far down?”

“A. The slough that is continuous there was made from my notes, from the meanderings down into Section 24, or down to the Bonestell place. The balance was made by sketching in from my knowledge of the country; my remembrance of it, and not from any actual survey, as I had not finished the entire township when called away from it. It is a finished map, so far as showing the condition of things at that time is concerned.” (T. II, fols. 1587 to 1589.) “It was made embracing that country which embraces the slough up to Section 24. It shows more than that. I had surveyed up that far. I had actually meandered to that point, and I made outline maps of it.

“Q. This map is correct up to that point, and beyond that you don’t know of its correctness. Is that the case?”

“A. *The map was made to show the country.* It was an outline map.

“Q. *I ask you if it is correct, this map, up to that point, Section 24?*

“A. *Of what it shows; yes, sir.*

“Q. *It was intended to show the slough as you meandered it, up to Section 24?*

“A. *Intended to show the slough as I meandered. I made the meandering of that slough, and platted it down, and traced it on the map.*

“Q. It is correct that far?”

“A. Yes, sir; I platted it down and made surveys.” (Fols. 1606–7.)

Maps D and B were made from actual surveys, were made at the time, and “to show the country as it actually existed in 1877 and 1878.”

But Maps 2 and 3 were not made until April, 1881 (fols. 395 and 410); they were made “for another purpose” (fol. 416); were made—on the very eve of the trial of this case—“to show the water-courses” (fol. 414).

They were not made from actual survey. Says McCray:

"I never made any surveys around Buena Vista Slough, except those made in 1877 and '78 (fol. 411).

"Q. Does this map number 2 represent exactly the map you made in 1878?

"A. No, sir.

"Q. In what respect does it differ?

"A. The map that I made for the company does not show the slough so much as this does; and it shows the section lines just as they are, and the levees and the weirs, and matters of that kind (fol. 412). This was made to show the water-courses through there, and the other was not.

"Q. This one was number 2?

"A. Yes, sir.

"Q. But the other was made by you from your actual survey?

"A. Yes, sir.

"Q. That didn't indicate the lines of the slough, as this map number 2 does?

"A. No, sir.

"Q. You didn't make this map from actual survey, but as a copy from your other map?

"A. I took such portions of the other map as I needed, and from examination upon the field, I put it all together.

"Q. But this map number 2 is not an exact copy of the other?

"A. Not an exact copy. This is made for one purpose and that for another (fols. 414 to 416). On the map which I made for the Kern Valley Water Company there only appeared the survey of this stream down to a point where I stopped meandering, and below that point there was nothing in the plat to show the meanderings of that slough or the crossings of that slough. The balance of the work done by me in the field to enable me to plat this slough from the point where it was dropped in 1877 and 1878, has been done within the

“last three weeks. A portion of it was done by actual
 “work in the field. That portion I had subdivided
 “was done by going into the field with the outline in
 “my hand and finding the corners, some of them, and
 “from that filling in from such as I had. The plats or
 “maps show the crossings of the sloughs below Section
 “14, at the very point where I located it in 1877 and
 “1878, and the filling in has been done by examination
 “between those points (fols. 423-4).

Map 2 was not made from the field notes taken at the
 time of the survey; for, says McCray, “those field
 “notes were turned over to the Kern Valley Water Co.
 “in 1878. I don’t know where they are now; the last
 “time I saw them was when I turned them over in
 “1878. I have not seen them since” (fol. 421).

“Mr. Flourney—I wish to see every paper—every
 “memorandum or data upon which you made either of
 “these maps, or both of them.

“A. I can show you the sketches that I took in the
 “field at the time. Made them as I went along. I have
 “the sketches with me.

“Q. These were the sketches made by you at the
 “time of the original survey?

“A. Yes, sir.

“Q. These are the sole data upon which you made
 “the map No. 2, except your observations in the field
 “at the time, of which you have no memoranda?

“A. I had this, and I went upon the field. These
 “were made upon the field, as I have stated to you, in
 “1877 and ’78. Then I took the map and went upon
 “the field; took map ‘B’ and map No. 2. I told you I
 “took it from this map ‘B’ also.

“Mr. Flourney—I will have these marked.

“[The papers are marked by the Reporter ‘E’ and
 “‘F,’ for identification.]” (Fols. 1610-12).

“Q. Was this the only original data of field work
 “that you made in the field?

"A. I had other maps; I had that map 'D.'

"Q. That is not field work?

"A. A portion of it came from that map." (Fol. 1614).

Let us now see how McCray describes the channels through the swamp, which he has pretended to represent on maps 2 and 3:

"Q. What does that line represent that is marked along there, all along here in Township 29 South, Range 23 East? (on map 2).

"A. It represents a continuous channel; that is, substantially so; that is, varying in width, and changes some from what it is in the upper portion.

"Q. Does it represent a channel with defined banks?

"A. Well, as a general rule—as a rule it does.

"Q. Is there any point where it don't, as indicated by this map? Does the map indicate any point that it don't?

"A. I don't know that it does—the map itself.

"Q. Then this is not exactly accurate in its representation as to that? These two maps that I am speaking of, from 14 to Tulare Lake?

"A. It is this way about it: *you can't always represent the truth upon a map; some things have to be explained.*

"Q. That is what I am getting at, the explanation, for fear that we might be misled by these marks. I was satisfied they were the ordinary ways of making marks by surveyors, and frequently they understood it better than others looking at them. Then there was a continuous channel the whole route?

"A. There was a traceable channel there. By traceable channel, I mean the water at low stage would pursue a certain course, such as represented there.

"Q. At low stages?

"A. At low stages; that is to say, it will not spread

"beyond the limits that are shown there." (Fols. 390 to 393).

Again:

"Q. Now, Mr. McCray, what is the condition—will take the slough in sections—what is the condition of the slough starting where you left off your meandering in 1877 and 1878 down to the point where you had represented the two channels as meeting at the north end of what we have marked as Weed Island. What is the condition of that slough on the east side of Weed Island?"

"A. As it now is; the channel is of different widths and also of different depths. In some points it is quite prominent and at others it spreads out over several hundred feet, perhaps, and it is so through a good portion of it. It alternates from one to the other.

"Q. Is there a well-defined channel between the point where you left off meandering in 1877 and 1878, in Section 14" (he means Section 24, *vide* fol. 1646), down to the point where the two channels come together at the north end of Weed Island?"

"A. There is a well-defined line showing where the water runs; but at some places it is quite deep and has steep banks; at other places it is spread over the ground at different widths of several hundred feet, and the lowest place is in the middle of it, *a sloping bank from there to the levee.*

"Q. How far is it from the point where you left off meandering in 1877 and 1878 down to the north end of Weed Island?"

"A. *Weed Island is a point I have not definitely established.* According to that map, it is about two miles from the north end of Weed Island, and of that two miles probably one-half of the channel would be with banks and a deep channel." (T. II., fols. 425 to 427.)

It is a very remarkable fact that, though McCray

made surveys and meanderings through the swamp, traced out channel after channel, slough after slough, made maps upon which he pictured the island, maps showing the country "as it actually existed," and maps showing the water-courses as he imagined them, for the purposes of this suit, yet when asked about the channels at Weed Island, says: "Weed Island is a point I have not definitely established." McCray having described section by section each channel shown upon map 2, on re-cross-examination is asked:

"Q. In describing the character of the channel, on yesterday, where there ceased to be perpendicular banks, what is the appearance of the country, from what you saw, to indicate that that was a place where a current ran?

"A. By being lower than at other points, and although it may have been wider at the extreme, it rose more suddenly from the bottom. It would rise to a level, but there would be a depression shown there very plainly to be seen. I went entirely across the swamp along there, and through it lengthwise.

"Q. Clear across the swamp?

"A. Yes, sir.

"Q. Did you find but one line of depression?

"A. No, sir.

"Q. You found but one line of depression?

"A. I found more than one line of depression different places in the swamp.

"Q. Did you find numerous lines of depression?

"A. In some places I would.

"Q. Numerous lines of depression, such as you speak of?

"A. Yes, sir.

"Q. Now, what appearance did the ground present; you say there was no water in this place; what appearance did the ground present, aside from the mere fact of the depression; was it bare?

"A. In the depression? Not at all times; no, sir.

"Q. How did it look; grown up with tules?

"A. It looked like it had tules in it. *Places you could not get through. It had tules in it.*

"Q. *You did go through it?*

"A. *Some places I did not get through.*

"Q. All over it?

"A. Sometimes in some places there was not.

"Q. How was it generally?

"A. *Generally in these depressions there was tules, but not always, though.*

"Q. *Generally there were tules extending clear across?*

"A. *Extending across the channels or depressions.*

"Q. And the tules were outside of the channels, were they not?

"A. Outside of the channels in places—out in the swamp.

"Q. And that same appearance of tule growth was in those other numerous lines of depression that you speak of out in the swamp as well as in where you supposed the channel to be?

"A. Well, *there were many depressions there that had tules within the depression; many that were detached like. They had no visible source or no direct outlet. The beginning and terminus would perhaps be over level ground, but depressed somewhat, and covered with tules. Then there were channels again that might be traced for a long distance.*

"Q. They were frequent, too, weren't they?

"A. I don't know that they were. There were a number of channels there that could be traced, but there are a good many places over the swamp—

"Q. (Interrupting.) You mean a number of places that show that water would naturally flow through in case there was water? Lower than other points?

"A. Lower than other points.

"Q. Then what you mean by there being defined channels at all places except where there were perpendicular banks, is where there were depressions and sloping banks, and, perhaps, wide channels, but

"indicating that it was a place where the water would naturally go, being lower than other points?"

"A. No, sir; that is not exactly what I mean by a continuous channel.

"Q. What do you mean, precisely?"

"A. What is a continuous channel?"

"Q. Yes.

"A. I say there were many depressions you would come across in going through the swamp—depressions that bore the appearance of having been a portion of the slough at one time; sometimes they would spread out over level ground, so as not to be perceptible to the eye, but to trace them from above or below a continuous channel would run along, perhaps a very narrow place, but it has different depths, where it could not be crossed. At others, again, it would run over ground of different widths, where there was no danger in crossing, and it might be at some points a depression such as would rise from a center to a level. That is a continuous channel." (T. II, fols. 807 to 814.)

Again:

"Q—As you come down from the Tule House, did I understand you to say that you found a continuous defined channel or the bed of the stream the entire route?"

"A—Over a great portion of it it was so.

"Q—Well, is there any of it that is not so?"

"A—There was a part of it that the channel was not so well defined as it was in the others. It was merely a water way.

"Q—The question I asked you was, is there a defined channel continuous there that entire route?"

"A—There is a channel running through the entire route, where the water at low stages will run only along that particular line.

"Q—Well, is there a defined channel, where water customarily or usually runs along the entire route, and a continuous channel?"

"A—There is, as I say, where water will run along that particular line.

"Q—I understand water will run all along there when there is any to run, and when it is high enough. I mean there are some places where there is a defined channel, and some where there is not?

"A—Yes, sir.

"Q—I want to know if there was when this survey was made, in this month you speak of, a defined channel or bed of a stream continuously along that route, from the tule shanty down to this point of connection here?

"A—The way that the slough is—

"Q—Just please answer me.

"A—Well, I can answer you by explaining it.

"Q—I want it answered in my way, and then you can explain it afterwards. I ask you this question: Was there from the tule shanty down to this point of connection where you run down going back southward, a continuous defined channel or bed of a stream with defined sides and banks?

"A—Not with well defined banks there; no, sir.

"Q—There wasn't?

"A—No, sir; not with well defined banks.

"Q—It presents the appearance that water had passed over it, at different places?

"A—It is what would be termed a water channel I presume.

"Q—But it did not have defined channels and banks. Was it defined at all, the sides and banks? You know what the bank of a stream is?

"A—It was this way. There was a depression there of perhaps a hundred or two or three hundred feet in width, may be. The water would go into that and it would be several feet in depth, but the banks from the bottom would be uniform. They were started at the lowest part and sloped gradually, so that the eye could not detect where they rose to the level.

"Q—Suppose there was no water at all there. How

“would know where the water stood or ran at that time?
 “Did it leave its mark where it usually coursed? That
 “is what I mean by the bank, where the water leaves
 “its mark as a margin.

“A. I think there would be no trouble at all in
 “finding it. At the time when I was there water had
 “been there, and stands along there in places.

“Q. I understand that—that always happens. But
 “I want to get at this point, whether there was any-
 “thing that shows that it is customary for water to
 “course—to pass along the particular place. You can
 “tell that. When Kern River was dry you could tell
 “where the water went—when there was water there.
 “I want to know if these margins or banks and bed of
 “this stream are so plain that you could tell from
 “here to there at every point? Not where you could
 “imagine the water could go: but where the water had
 “left its own impression by leaving banks and sides?

“A. No, sir.” (Fols. 400 to 406).

On re-direct examination:

“Q. If you should turn into Buena Vista Slough, a
 “regulated and moderate head of water, enough to go
 “through from one end of the slough to the other, is
 “there a channel that that water would run through
 “before it would spread out and cover the body of
 “swamp and overflowed lands?

“A. I think not. That is it would spread over a
 “portion, not all of it.” (Fol. 453).

THOS. L. BRIGGS (for plaintiffs), who was through
 the swamp more or less, from 1864 to the present time,
 is asked on direct examination:

“Q. Now, Mr. Briggs, from the time you went on
 “that slough in 1864, until this year, when you have
 “been passing up and down the slough, crossing it,
 “what have you found in that slough in the way of a
 “channel to carry water?

“A. I found it a very well-defined channel between

"Buena Vista Lake and Tulare Lake—that distance
"between those two lakes.

"Q. Is there a channel defined there that would
"carry water?

"A. Yes, sir.

"Q. How deep is that channel upon the average?

"A. From four to twenty feet deep—various depths.

"Q. How wide?

"A. From twenty yards to one hundred yards, in
"places." (Trans. II, fol. 1105-6).

But on cross-examination he flatly contradicts himself:

"Q. What do you mean by a well-defined channel
"from Buena Vista Lake to Tulare Lake?

"A. I mean at very low places.

"Q. You mean simply low places?

"A. Yes, sir; where there is not much tule in it.

"Q. Not much tules in places, and other places
"tules grow over it, just like the balance, isn't it?

"A. No, sir; not in those places. That is the same
"as to both of these channels. I never traced down
"the channel from Buena Vista Lake to Tulare Lake.

"Q. Did you ever follow directly on the line of the
"main channel from Buena Vista Lake to Tulare Lake?

"A. I have for some distance, but not the whole
"distance. I call the main channel the one on the east
"side. It is a well defined channel. It runs on the
"east side of Weed Island; what I call the main chan-
"nel. I have not been to Weed Island very lately. I
"was there last in 1880. The channel was there, and
"the same as before.

"Q. Have you noticed, in your experience in the
"slough, any change of the channel at any time?

"A. No, sir; the channel in 1880 was the same as
"when I first became acquainted with it.

"Q. In all respects?

"A. To the best of my knowledge.

"Q. Suppose you cross the swamp, which you did

"do frequently, as you say, directly across from the east
 "to the west, crossed Weed Island and struck directly
 "across the whole swamp land district, how many chan-
 "nels would you strike?

"A. At one point?

"Q. At what point, crossing at the middle of Weed
 "Island, right across from east to west, about how many
 "channels would you strike?

"A. There is two. One is on the east side of Weed
 "Island. That is the main channel; and the other is on
 "the west side, right at Weed Island. These two chan-
 "nels form Weed Island. *There is no other channel than*
those two. Those channels around Weed Island have not
well-defined banks in all places. The banks are sloping.

"Q. How many places are there that are not well
 "defined, by well-defined banks?

"A. I don't know. There is quite a lot of places.

"Q. Can you always find the banks, and know ex-
 "actly and precisely where the banks are?

"A. Yes, sir.

"Q. How do you know that? Did you try that?

"A. I have been all over the country there, and
 "when I see the banks I can tell them.

"Q. Well, in all places that you saw the slough, you
 "saw well-defined banks?

"A. No, sir; I did not say that.

"Q. If there were not well-defined banks, how do
 "you know, then; how could you be certain?

"A. *Whenever there is banks, I ought to know when I*
see a bank.

"Q. Of course where there is a bank, you can tell
 "that. I mean where there are no banks?

"A. I did not say that.

"Q. If it had no banks, you could not see it?

"A. No, sir.

"Q. *There are a great many places where it has none?*

"A. *Yes, sir.*" (Fols. 1115 to 1120.)

We do not propose to follow plaintiffs' witnesses

through their many varied and contradictory descriptions of the sloughs and channels in the swamp. Most of these witnesses were "hog-men" or cattle herders who in looking after their animals would go plunging through the swamp, indifferent as to whether they swam a water-hole or passed around it dry shod. We have, however, quoted somewhat at length from the testimony of both Crocker and McCray, our reasons for selecting them being that though by no means the most disingenuous, they are amongst the most intelligent of plaintiffs' witnesses, and from long residence or careful examination should have had peculiar means of information about the swamp.

T. M. EPPERLY (for plaintiffs):

"Q. Has there been any change in that channel since you first knew it in 1873 to the present time?

"A. Not that I can see, any more than the drift pile.

"Q. What change has taken place at the drift pile?

"A. The wood that has drifted in there has been "burned out and hauled out there and left the channel "more bare than it was when I went there. It has a "better channel to pass through than it did when I first "went there." (T. II., fol. 2193.)

A. GLENN (for defendant):

"Q. Have you any knowledge of the Swamp Land "District, between Tulare and Buena Vista Lakes?

"A. Yes, sir; I have been there frequently, up and "down. I was first in that section of the country in "1857; about that time; I was there until 1860.

"Q. Were you there after 1860?

"A. Frequently." (T. III., fol. 594.) "In 1857, I "was around the head of Tulare Lake, I think that was "in the spring, sometime between May and June. I "don't recollect exactly the time.

"Q. How far were you above the north end of the "Lake?

"A. I suppose I was probably 12 or 15 miles, somewhere along there.

"Q. The south end, I mean?

"A. That is what I thought. That is what we call the head of the lake.

"Q. Did you ever cross that country there at the head of the lake?

"A. Yes, sir, I have been there. I have been through different places, I guess, 4, 5 or 6 miles, may be above the head of the lake. I crossed at that time at the road. *The road ran from Visalia to San Luis Obispo.* As well as I recollect, I think it crossed 5 or 6 miles somewhere along there above the head of the lake, south of the head of the lake. I crossed on the road in 1857. I also crossed it there in 1859. That is, I was through the country there and in the road; I traveled across that road—I went across. That was the road from Visalia to San Luis Obispo at that time.

"Q. Did you cross any water on that road?

"A. Well, none later than 1861 and '62.

"Q. Was there any dry channel or washout that you saw?

"A. I don't think there was. Of course I didn't pay much attention to it. I was just crossing on horseback.

"Q. You were down there in the spring of '57, and you were there in '58, and '59, and '60?

"A. Yes, sir; I was there every year when I lived below Visalia. I was there in the fall and spring generally.

"Q. Did you ever see any water or sheet of water connecting Buena Vista Lake with Tulare Lake?

"A. Yes, sir; the first time that I saw that was in 1862; it was in either 1861 or '62—1862, I think—and again in 1867 I saw it.

"Q. Did you ever see a connection of water between these two lakes at any other time?

"A. No, sir" (fols. 595 to 598); "I have frequently

“been up in the swamp country south of the San Luis
“Obispo road.

“Q. Did you ever cross the swamp above that?

“A. I have been out in it quite a ways; I never
“went entirely across.

“Q. What is the character of the country in that
“Swamp Land District?

“A. It is a level country.

“Q. How is the water in it at different seasons of
“the year?

“A. I have been there when there was plenty of
“water, and I have been there again when it just stood
“in pools or ponds. When there was plenty of water
“it would be spread out for a mile or two wide, I sup-
“pose. We always called it a swamp, and that is what
“it was always termed. I never lived there; I was
“there very frequently, when I would cross it and was
“in it. I would most generally go below to where Mr.
“Broder used to live, and he had some Spaniards there
“who understood going through, and I frequently fol-
“lowed them. When I first knew it, in 1857, the
“swamp did not extend down as far as the road that I
“have spoken of, and crossed from Visalia to San Luis
“Obispo. There was not any swamp for some distance,
“I don't recollect how far, but it was some distance be-
“fore you would see any tules. That was a kind of
“high sagebrush and alkali country, clear across. I
“never have been in that country when the water would
“rise in the swamp above when the water came down,
“nor when it came down. It was either spread over
“the country when I was there, or else it was dried up
“and in holes.

“Q. How was it about these holes, were there con-
“necting channels between them?

“A. I don't think so; at the time, of course, I did
“not pay any particular attention.

“Q. What direction did those holes or ponds take—
“north or south, or east or west, or what was the gen-

“eral direction of them, or did they have any general direction?”

“A. When you found a kind of a long valley, it was most generally the north and south in direction. There were a great many or several round holes. Of course when I was riding through the country, I never expected to be called to tell anything certainly, and I never paid any attention to it, because I was hunting for stock.

“Q. It was always called a swamp country?”

“A. We called it that. I never heard it called a water-course or a stream of water.” (Fols. 599 to 603.)

CALVIN DUNLAP (for defendant):

“Q. Have you any acquaintance with the Buena Vista Slough country?”

“A. Some little; yes, sir.

“Q. The swamp land district between Tulare Lake and Buena Vista Lake?”

“A. Yes, sir. The first recollection I have of it was in 1861. I have been there from 1861 pretty nearly every year until 1874; in the spring and fall.

“Q. Did you ever see the waters connected from Buena Vista to Tulare Lakes?”

“A. Yes, sir; I think I did, in 1861 and '62, and 1867. I never saw them connected at any other time that I know of.” (T. III, fols. 604-5.)

WALTER JAMES (for defendant):

“In May, 1871, crossed the body of swamp lands from the east to the west side, at a point about Goose Lake.

“Q. In crossing over from Goose Lake to the high land on the west side of the swamp and overflowed land, did you find any channel?”

“A. No, sir; we did not see any channel at all; the country there was very dry; tules had been burned off, and no tules had started yet; we found no water there at all; we were looking for water, to find a place

"to camp in the swamp land; we passed clear across
"without seeing any indications of water or slough.

"Q. You say you were looking there for water.
"Why?

"A. According to some map which we had, we expected to find sloughs passing between Goose Lake and the dry land on the other side." (T. III, fol. 128.)

"[The witness is shown plaintiffs' Maps 2 and 3, and asked to designate the point where he crossed the swamp land upon his trip of May, 1871.]

"From Goose Lake, I think, we traveled in a westerly direction across Sections 23, 22 and 21, and Section 20, in Township 27 south, range 22 east. I do not wish to state that those were the sections through which we passed at that time; but going from Goose Lake in a westerly direction would have taken us through those sections as near as I now know; we passed about through that portion; the maps we had showing the slough, through the centre of the swamp land, and to which I referred, were some printed maps; I don't know that I can describe them; we were looking for a place to camp, and very anxious to find water at the time; this was in May, 1871; we were looking through the swamp for a place to camp.

"Q. Did you find any indications whatever of a channel?

"A. None that we noticed.

"Q. I see on that map, No. 3, that there are several channels indicated through those sections that you have described. Were those, or any of the channels of that description, there at that time?

"A. We saw no channels whatever.

"Q. Did you see anything to indicate that there ever had been a channel there?

"A. No, sir; my recollection is now that it was plain tule land from one side to the other; it was a very flat, even country; the tules had been burned off—the greater portion of them." (Fols. 136 to 138.)

E. H. DUMBLE (for defendant):

In April, 1863, Dumble crossed the swamp at from 8 to 12 miles south of Tulare Lake; found shallow water for about three-fourths of a mile; the deepest water was right in the cattle trail which he followed in going across. "It was deeper right on the trail than it was off to either side. The trail was trampled down; it was from 2 feet to nothing. We crossed over some high places and salt grass.

"Q. Did you find any channel?

"A. No, sir; there was no channel.

"Q. Any signs of a channel?

"A. No signs of a channel. I crossed it twice in 1863, very near the same place. The other time I crossed it in August. In August I crossed from the east to the west, going the same route, very nearly; I could not say it was on the same trail exactly. I found water in one hole in crossing. We went around it, to the north end of the water hole. We found no channel in that crossing; nothing but that hole. We went around it on level ground; that is, to all appearance. As near as I could see, it was perfectly level."

TIV (T. IV, 1034 to 1037).

Dumble also crossed there in 1864 and '65. Found occasional water holes, but no channel. (fol. 1038-9).

J. P. MURRAY (for defendant), who was all through the swamp from 1864 to 1877, is asked:

"Q. How is it as to the existence of any continuous channel through that swamp, from Wible's headquarters to Tulare Lake?

"A. Well, there is not much of a channel along there. There is some sloughs along there, but after you get down to where Wible's camp is now, this Buena Vista Slough that comes down about there; a little below, if I recollect well; it spreads out all over the country.

"Q. How is it as to a continuous slough along there; is there, or is there not?

“A. I have never seen a continuous slough through
“that country.” (T. IV, fol. 1511).

In the early part 1881 a number of defendant's witnesses made a thorough exploration and examination of the whole body of Buena Vista Swamp north of about the half section line through Sections 7, 8, 9 and 10, T. 29 S., R. 22 E. They crossed and recrossed the swamp many times and in all directions. They crossed it from one side to the other where it was absolutely dry, and they crossed it where the waters were spread over the swamp from the high ground on the east to the high ground on the west. They were not all making their explorations together, but were going about in twos or fours, in different directions and on different occasions. Though they found many sloughs, hollows and depressions interspersed throughout the swamp, their testimony is unanimous and positive that there is nowhere within that swamp any continuous or connected channel through which water would flow. So absolutely convincing is the testimony of these witnesses that plaintiffs, appreciating its immense importance, attempt to detract from or lessen its weight by a purile attack upon the credibility of these witnesses, based upon the sole ground that they are, all or many of them, employees of Messrs. Haggin and Carr.

Properly we should insert here the entire testimony of these several witnesses, but as that is not possible and as the whole of their testimony should be read in order to appreciate the parts, we will but refer to the pages and Vols. of the Transcript and ask that your Honors read such portion of the evidence before deciding this appeal;

WALTER JAMES.

Direct examination, T. III., fols. 185 to 226.

Cross-examination, fols. 265 to 299.

This trip of James was made on the 22d, 23d and 24th

of April, 1881. Charles Jackson was with Mr. James, and Capt. Taylor and Mr. Schuyler were along in a separate vehicle.

HENRY A. JASTRO.

Direct examination, T. III., fols. 362 to 370.

Cross-examination, fols. 376 to 379.

On this trip of Jastro's, Capt. Taylor, Vining Barker and Ed. Cross were along.

MURRAY F. TAYLOR.

Direct examination, T. III., fols. 380 to 444.

Cross-examination, fols. 445 to 461.

Mr. Taylor made two trips, the one commencing April 14th, 1881, with Jastro, the other commencing April 21st, 1881, with Mr. Schuyler.

ED. CROSS.

Direct examination, T. III., fols. 473 to 486.

This trip was made with Barker, Jastro, and Taylor between the 14th and 20th of April.

VINING BARKER.

Direct examination, T. III., fols. 611 to 622.

Cross-examination, fols. 623-24.

F. B. McCLUNG, in company with Dr. McLean, Reading, Captain Taylor and Dr. Thornton. This trip was made May 14, 15, 16 and 17, 1881.

Direct examination, T. IV., fols. 422 to 445.

Cross-examination, fols 445 to ~~446~~ 466.

C. G. JACKSON.

Direct examination, T. IV., fols. 467 to 516.

Cross-examination, fols. 551 to 557.

GEO. F. THORNTON.

Direct examination, T. IV., fols. 588 to 607.

Cross-examination, fols. 608 to 614.

H. A. READING.

Direct examination, T. IV., fols. 625 to 653.

Cross-examination, fols. 654 to 690.

Re-direct examination, fols. 691 to 700.

J. D. SCHUYLER.

Direct examination, T. IV., fols. 810 to 841.

Cross-examination, fols. 842 to 867.

D. G. McLEAN.

Direct examination, T. IV., fols. 1513 to 1524.

Cross-examination, fols. 1550 to 1571.

Re-direct examination, fols. 1572 to 1578.

W. R. Macmurdo and T. R. Fillebrown, civil engineers, ran a line of levels from the west to the east side of the swamp, through Sections 10, 9, 8 and 7, T. 29 S., R. 23 E., the result of which they show on "Exhibit P." We call your Honors' attention to this Exhibit.

W. R. MACMURDO is asked by the Court:

"Q. Is this one you have in your hands (Exhibit "P) an exact profile in accordance with these notes taken by you and Fillebrown?

"A. Yes, sir.

"Q. In every particular?

"A. Yes, sir." (T. IV, fol. 1377.)

In this Profile P, your Honors will notice a depression in about the middle of the profile.

Macmurdo says:

"We found a flat country grown over with tules, almost the whole distance; sometimes would come to a clear place where there were grasses growing on the ground, a little higher than the general surface of the swamp. In the centre of the swamp we crossed a pond. Then we ran on through to the west margin of the swamp. We found nothing but tules and a level country straight through. When we got near the

"levee of the Kern Valley Water Company, the land
 "was a little more uneven, and there were some salt
 "grass hills or knolls. In making that survey, we took
 "an assumed elevation on the east margin of the swamp,
 "and ran through until we reached this pond; then ran
 "around the bank of this pond until we got opposite to
 "where we had started to make the turn. *We went*
 "*around the south end of the pond*; and from the western
 "side of the pond we went due west again, on the same
 "line we had been running on. We went through to
 "the western side of the swamp." (T. IV, f. 1099 to
 1101.)

"Q. After reaching that pond, what did you do?

"A. We took the levels then right around the bank
 "of the pond, following southward until we reached the
 "south extremity of the pond; then we followed along
 "the bank until we got back opposite a point that we
 "had left on the line, on the east and west course. Go-
 "ing around the pond, the country was an unbroken
 "tule growth.

"Q. Any depression around the end of this pond?

"A. No, sir.

"Q. Any channels?

"A. There were no channels. We went around the
 "south end." (Fols. 1109-10.)

The levels around the south end of the pond are shown
 by the small profile line on Exhibit P.

Macmurdo afterwards went back and examined the
 north end of the pond. He is asked:

"Q. And how did you find that?

"A. We found water down in the slough for a short
 "distance, and then the bottom of this pond commenced
 "to rise up until it got up on a level with the outside
 "country.

"Q. Did you take any level at the north end of the
 "pond?

"A. Yes, sir; I took a level in the lowest ground I
 "could find there in this line of this pond; and the top
 "of that ground, or what would be called the bottom of

“the pond—if there was any there—that far, it was two feet higher than the water extended in this pond, and was about the same elevation as the surrounding country.” (Fols. 1135-6.)

“Q. What was your object in making that cross section?”

“A. My object was to find out whether there was any continuous channel through that body of swamp land or not.

“Q. Can you explain whether or not a surveyor, in making a cross section through there, would go around any such thing as this pond?”

“A. I don’t think he could do anything else. There would be nothing else for him to do, if that was his object, as it was ours. We continued through until we met with the pond, and to find out whether it was a pond or slough, or whether it was a lake, or what it was. We went around the bank of it, and found out the elevation of these banks in regard to the line that we were running; continued around on the ground to see whether there was any inlet or outlet to it. Had we not gone around, it would not have shown us the true state of the case; it would not have been a true profile of the country.

“Q. Could you, by simply going straight through there, without deviating at all from your course, have found out what you went there to seek or not?”

“A. No, sir; it would not show as a pond, which is the true state of the case. It would not have been a true profile of the country if I had gone straight through. It would not have shown what it was our purpose to show. Had there been any channel along that course, I should have seen it.

“Q. Any continuous channel?”

“A. Certainly; my object in going around that pond was to see what it was. That pond was not a part of any continuous channel.

“Q. Could a surveyor ascertain whether there was

"a continuous channel there or not without going around that pond, and things that you met?

"A. No, sir; unless it should happen that he struck it, and got through it in a straight line, where there would be no pond, which he might do." (Fols. 1378 to 1381.)

Both Macmurdo and Fillebrown state positively that in running these levels through Sections 10, 9, 8 and 7, they found no channel or slough whatever; that there was none; that this pond they speak of had neither inlet nor outlet, and was not a part of any channel.

L. L. Dixon and C. G. Jackson assisted in the running of these levels, and also state that there was neither inlet nor outlet to the pond; also that there was no slough or channel whatsoever along the line of that crossing. Without further comment we refer your Honors to the testimony of these witnesses upon this line of levels, and the character of the country through which it run:

MACMURDO: Transcript IV.

Direct-examination, fols. 1099 to 1114, 1131 to 1143, 1170 to 1173, 1367 to 1381.

Cross-examination, fols. 1280 to 1315, 1333 to 1352, 1391 to 1392.

FILLEBROWN: Transcript IV.

Direct-examination, fols. 255 to 283.

Cross-examination, fols. 325 to 343.

Recalled, fols. 1453 to 1465.

DIXON: Transcript IV.

Direct-examination, fols. 701 to 706, 711 to 718. *783 to 787.*

Cross-examination, fols. 737 to 762, 787 to 792.

JACKSON: Transcript IV.

Direct-examination, fols. 517 to 521.

Cross-examination, fols. 568 to 582, 586.

As to that portion of the swamp south of Sections 7, 8, 9, and 10, T. 29 S., R. 23 E.:

J. D. SCHUYLER (for defendant), in the course of his official business as Assistant State Engineer, crossed Buena Vista Swamp seeking information in regard to the topography of the country. Wible (one of plaintiffs' chief witnesses as to channels within the swamp) accompanied Schuyler on this trip, and conversed with him upon the topography of the country. (T. III., fol. ~~1577~~ 1557)

"Q. Did you, in the progress of that trip across there, come to anything in the nature of a slough or channel?

"A. Yes, sir.

"Q. Whereabouts was that?" (Fol. 1557-8.)

"A. As I recollect it, it was south of the Bonestell house, about half a mile, or a mile.

"Q. Was there something in the nature of a channel which you crossed?

"A. Yes, sir.

"Q. Did you go up and down that, at that time?

"A. As I recollect, we crossed the channel and came to the swamp land, at the east of it; and after passing down southeast of it we came to a bank, going on up, a little distance, striking it occasionally, as we drove along.

"Q. After passing that, had you seen any other channel through there?

"A. Not that I recollect.

"Q. Did you have any conversation with Mr. Wible at that time about the channels and sloughs in the body of the swamp land?

"A. I did, sir. We were conversing about the character of the country all of the way along.

"Q. Will you repeat, as near as you can recollect, that conversation?

"A. I would find that a very difficult thing to do.

"Q. What did Mr. Wible say in reference to that channel there—did he say anything?

"A. He described it to me as a blind channel, the most of the way; that it terminated beyond, or near Bonestell's.

"Q. He told you the channel terminated where?

"A. Near Bonestell's.

"Q. Did he say that that was the only channel in the body of the swamp land?

"A. Yes, sir; that is how I recollect it.

"Q. You were seeking for information on that trip relative to the topography of the country?

"A. Yes, sir." (Fols. 1560 to 1563.)

W. R. MACMURDO (for defendant):

"Q. Do you know anything about Buena Vista Slough?

"A. Yes, sir; I am familiar with Buena Vista Slough from the lake down as far as it goes—as far as there is any slough.

"Q. Have you made any survey of that slough?

"A. Yes, sir; I have meandered that slough as far as there is any slough to be found—as far as the end.

"Q. Whereabouts does it end?

"A. It ends on Sec. 24, T. 29, R. 23.

"Q. When did you meander that slough?

"A. I meandered a part of it in May, 1879, and a part of it, I think, was in 1880.

"Q. Have you examined that slough from Buena Vista Lake to that point you speak of where it ends?

"A. Yes, sir.

"Q. You say that it ends on Sec. 24, T. 29, R. 23?

"A. Yes, sir. I know where Wible's headquarters are. They are on Sec. 15; I think it is on 15, or near the line of 14 and 15, T. 30, R. 24. It is on the east half of the east half of Sec. 15. I think it is about a quarter of a mile from the south line of 15. It is on the S. E. quarter of the S. E. quarter of Sec. 15.

"Q. In going from Buena Vista Lake northward

“ along the slough, say at about Wible’s headquarters.”

“ how did you find the slough from there ?

“ A. From Wible’s headquarters, or what is known
“ as Wible’s headquarters, going northwesterly, that
“ slough, it has—

“ Q. [Interrupting.] Start about half a mile south
“ from Wible’s headquarters, and then trace the slough.

“ A. About half a mile south—that would be in Sec.
“ 23—it runs in a very crooked channel until it gets on
“ Sec. 14, near the S. W. corner of Sec. 14, T. 30, R.
“ 24. There the slough, when I meandered it, was
“ dammed up by having a levee across it; a levee placed
“ there to make one bank of the Kern Valley Water
“ Company’s Canal.” (T. IV, fols. 1062 to 1065.)

“ Q. After crossing the levee and going northward,
“ will you describe this slough ?

“ A. This slough continues on pretty much the same
“ character of slough. It is very crooked; gouged out
“ in deep holes on the bottom; has perpendicular banks
“ in places; continues on in that way probably a mile
“ to the northwest; it continues that way to Section 15,
“ until it reaches the north line of Section 15.

“ Q. Continues how ?

“ A. Continues to run very crooked, and it has very
“ deep holes along there, and it has well-defined banks
“ until it reaches very nearly the north line of Section
“ 15, T. 30, R. 24. There are ponds on the outside of
“ the channel, and the water of the slough goes up in
“ this pond there and into Section 15, between the chan-
“ nel and the bank of the canal.

“ Q. You say that it has defined banks. How are the
“ banks as to height above the bed of the slough ?

“ A. *It is hard to tell where the bed of the slough is*
“ *there.* There are deep holes in it. In some places
“ they are 10 feet, I suppose, above the bottom of the
“ slough.

“ Q. These deep holes ?

“ A. That is, the deep holes. The water;—take an
“ ordinary small head of water, and run it through

“ there and it will be probably 4 feet above the surface
“ of the water.

“ Q. That is, the lowest bank in there would hold 4
“ feet of water in Section 15?

“ A. I don't know. *There are probably lower places*
“ *than that.*

“ Q. *There are places where 4 feet of water would not*
“ *be contained in the banks?*

“ A. *I think so.*

“ Q. From the north line of Section 15, describe the
“ slough through the next section, that is, Section 10,
“ T. 30, R. 24.

“ A. The slough, a part of the way, has good banks
“ in there, and it is very crooked, and the current is very
“ sluggish, very slow. It has very little fall, and it has
“ very low ground on both sides. There are places where
“ the bank is very low, almost as low as the bed of the
“ stream in places. On the east side of the slough the
“ bank, as a general thing, is higher than on the west
“ side.

“ Q. *The bank is as low as the bed of the slough*
“ *itself?*

“ A. Yes, sir.

“ Q. What depth of water will that portion of the
“ slough carry without getting out of the banks through
“ Section 10?

“ A. I hardly know how much it would carry; in
“ some places it has deep holes in there. Through the
“ greater part of 10 it would carry, probably, as much
“ water as in 15, until it got pretty well up into Sec-
“ tion 10. Then the banks are lower, and it would
“ carry very little water; two or three feet of water
“ above the general bottom of the slough.

“ Q. You think it would carry two or three feet at
“ every point through without overflowing the banks
“ at all through 10?

“ A. No, sir; up to a good way in 10. I say I don't
“ know how far exactly; pretty well up into 10. The
“ bank on the east side is a good bank. *On the west*

" *side it is low, and it has a levee along that bank to keep*
 " *the water from flowing out.*

" Q. Then, in your description of the amount of
 " water, have you taken into account the levee that is
 " used?

" A. No, sir; through the balance of Section 10 the
 " banks get lower, and continue to get lower until it
 " gets up into Section 3.

" Q. How is it in Section 3?

" A. The banks there are lower, and there are
 " hardly any banks to it at all. It would carry prob-
 " ably one foot of water along there without overflow-
 " ing.

" Q. How is the general course of the slough
 " through Section 3?

" A. It is not so crooked as through Section 10. It
 " runs through a small portion of Section 3 only.

" Q. And then from the north line of Section 10,
 " what is the course of the slough for the next mile or
 " two; is it correctly laid down here on map I?

" A. Yes, sir.

" Q. It runs through a little portion of Sections 3
 " and 4, and some of Section 5, and to the north town-
 " ship line of Section 30?

" A. Yes, sir.

" Q. From the north line of Section 10, to where
 " it reaches the township line, please describe the
 " slough?

" A. The slough there is very shallow and unde-
 " fined. It has banks in some places, and they are
 " very low, and in other places it has no perceptible
 " banks, and is very undefined. The general course of
 " the slough is northwest. It is pretty crooked and
 " has a great many bends.

" Q. After leaving Section 10, as laid down on this
 " map I, and going through Section 32, and a portion
 " of Section 31, to the north line of 31, T. 29, R. 24,
 " how was that portion of the slough?

" A. That portion was a well defined slough, having
 " banks probably two or three feet high.

" Q. Will you look at the map and describe the re-
 " maining portion of the slough from the north line of
 " Section 31, T. 29, R. 24?

" A. The slough there has banks, but the banks
 " from there begin to get lower, and the slough begins
 " to get narrower and smaller and shows signs of de-
 " creasing in every way in its capacity. The tules are
 " growing in it in places, but not entirely across.
 " Then coming down from the north line of 31, same
 " township and range, the slough has a defined channel
 " from there through Section 25, T. 29, R. 23. The
 " channel is still very crooked, and is getting smaller
 " all of the time to the north line of Section 25, and
 " the balance of the slough through Section 24, for
 " about half a mile, has very low banks. *The banks*
 " *get lower as you go north, until finally it runs out in the*
 " *tules, and there is no appearance of a channel. The*
 " *water spreads out all over the tules there—the swamp.*
 " *There is no appearance of a channel any further.*
 " *We were unable to trace it any further—any defined*
 " *channel.*

" Q. Your object in making that meander was,
 " what?

" A. To find and to lay down correctly on the map
 " any channel that there might be through that body
 " of swamp land.

" Q. In going from Wible's camp north, did you
 " find any branches or other channels running out of
 " that channel?

" A. I found no branches at the time I was
 " meandering it—found no branches at all. At other
 " times I have seen the water flowing out all over the
 " banks; I did not call them branches.

" Q. When you meandered through there, was there
 " any water in the channel?

" A. The first time I meandered from the Head-
 " quarters camp down toward Section 3, there was

“ water standing right in the tules; there was no water
 “ running in there at the time. I crossed it at Section
 “ 4, I think it was, T. 30, R. 24; I crossed it at that
 “ time, and there was no water holes or water at all at
 “ that time.

“ Q. When did you meander the balance of the
 “ channel?

“ A. The balance of the channel southward from
 “ there towards the Headquarters camp, and there was
 “ water standing in deep holes in it.

“ Q. From Section 4, northward, when did you fin-
 “ ish meandering.

“ A. In 1880, I think, about May—April or May—
 “ I think it was—I saw no branches.

“ Q. When you reached the end of the slough in
 “ Section 24, did you go any further north at that
 “ time?

“ A. Yes, sir; I went northwest and northeast; but
 “ the water was flowing out all over the country so that
 “ I could survey no further. I went as far as I could
 “ trace out the channel—that is, as far as I could per-
 “ ceive any channel at all.

“ Q. When were you down on the slough again
 “ from Wible's Headquarters, northward?

“ A. I think I was there again in September or Oc-
 “ tober, 1880. The slough at that time was dry. I
 “ went along it again, a portion of it, between the south
 “ line of Section 32, T. 29, and along the banks of it
 “ up to Bonestell's house. I went up to the east bank
 “ of it, and crossed over before we got to Bonestell's.

“ Q. How wide is that slough at the various points
 “ and parts?

“ A. It is of different widths; it has different widths
 “ at different points. It would average 50 or 60 feet
 “ wide from the line through the south line of Section
 “ 32. From there northwesterly it would average from
 “ 50 to 60 feet, and right near the end of it where the
 “ channel ceases, just before you get to the end of it,
 “ it is just about 20 feet; gets smaller for about one

“ mile before you get to the end of it, and begins to
 “ grow smaller. Where the channel ceases, where I
 “ stopped my survey of it, it had just spread out into
 “ the tules.” (T. IV., ~~1067 to 1082~~ 1062 to 1082.

“ Q. I understood you to say that you had, some
 “ time in 1880, October or September, been back on a
 “ portion of the slough north of Wible's Camp.

“ A. After I made the survey of that slough in 1880,
 “ in May, I went back again in October. I went to
 “ Bonestell's house. From Bonestell's house I went
 “ northwest, probably a mile, not following the slough.
 “ We went pretty close to the slough, and then we went
 “ northwest up this swamp, and after we got probably
 “ a mile we turned and went east to the margin of the
 “ swamp. After going a mile from Bonestell's north-
 “ west, we turned and went east to the margin of the
 “ swamp.

“ Q. Whereabouts is Bonestell's house ; do you
 “ know ?

“ A. The house is on the southwest quarter of Sec-
 “ tion 24, T. 29, R. 23.

“ Q. Point out here, if you please, the sections
 “ through which you passed ?

“ A. I went through Section 24, the southwest
 “ quarter, in a northeasterly direction, and through
 “ Section 23 into Section 14, to some point, I suppose,
 “ about in Section 14. I suppose it was a mile beyond
 “ Bonestell's house. From there we went in a north-
 “ easterly direction towards the margin of the swamp.
 “ One reason I went down there was to see if there was
 “ a channel down in that part of the swamp. When I
 “ was there before the whole country was filled with
 “ water, so that I could not see it. The country was
 “ dry at the time.

“ Q. Did you find any channel there then ?

“ A. No, sir.

“ Q. None whatever ?

“ A. No, sir ; nothing that you could call a channel.
 “ there was one place that we crossed a pond ; it was

" a basin ; it was dry entirely ; a kind of basin ; no
 " appearance of a channel.

" Q. You found no channel going through there at
 " all ?

" A. No, sir ; I found the condition there to be the
 " same as when it was wet." (Fols. 1085 to 1089.

Again :

" Q. Then you had been all along this slough from
 " Wible's headquarters up to Bonestell's upon several
 " occasions, it seems. How much water, do you think,
 " will flow down that slough to Bonestell's before it will
 " run out anywhere ?

" A. Well, a very small head of water would run
 " through there without wasting at the sides; I don't
 " think that over a foot in depth of water would go
 " through there without some of it running out.

" Q. What amount of water? How many cubic feet
 " per second ?

" A. Well, I think 20 or 30 feet per second. Run-
 " ning through there some of it would waste out in
 " places, on the sides of the slough.

" Q. Suppose you turn in sufficient just not to waste
 " out of the slough, just to go into the slough, without
 " going out, to fill up to the top of the low places, would
 " that amount of water run to Bonestell's ?

" A. It depended on how long they kept it running;
 " it would take some time for it to run through if you
 " if you turned it in while the slough was dry; it would
 " take some time for it to run through, for a good deal
 " of it would soak into the ground ; it would run very
 " slowly; a small head would run very slowly; a large
 " proportion of it would soak into the ground, and it
 " would take some time to reach there, because the
 " slough is very crooked, and it is some distance.

" Q. Suppose you turned in 100 cubic feet per sec-
 " ond from that waste gate near Wible's Camp, how
 " would that water flow, from your observation ?

" A. Well, sir, a part of it would go down the

“slough. I think the great part of it would flow over
 “the sides of the slough, over the banks, and spread out
 “over the country, all through the tules. All that
 “went through the channel running through Weed Isl-
 “and would go beyond Bonestell’s a short distance, and
 “then would spread out in the tules, and spread all over
 “the swamp in every direction (fols. 1180 to 83).

WM. SOUTHER (for defendant):

“Q. Do you know generally that body of swamp
 “land between Wible’s headquarters and Tulare Lake;
 “do you know that body of swamp land?

“A. I do. I attempted to farm down there. I
 “sowed some grain in the spring of ’78, east line of
 “canal which runs from just above Wible’s headquar-
 “ters to the north. It was on Section 2—a portion of
 “it. The other sections I don’t remember. I can show
 “you the point on this map. The line of canal is con-
 “structed there. That portion of Sections 2 and 11”
 (referring to map.) “It was on the southwest
 “quarter of 2.

“Q. Did you ever see that map before, Mr. Souther?”
 (Map D. shown to the witness.)

“A. I saw this map, or one just like it. I could not
 “swear that is the map. We had one down there. Mr.
 “Livermore used to carry a map just like that. He
 “and I would go up and down with the map. It was
 “made by Mr. McCray. I take this to be either that
 “map or a copy of it. I used a copy of that map in
 “connection with my work down there; one just like it,
 “at least. It might have been this, but I think not. I
 “think Mr. Livermore kept this, or one like it. Wible
 “had one, Livermore had one, and I had one.

“Q. Can you now designate on that map what por-
 “tion of those lands you cultivated or sowed?

“A. It was in the south half; you may say, a portion
 “of the south half of Section 2; Sections 11 and 2. I
 “said the southwest quarter of Section 2. I sowed
 “grain on that portion of Section 11, east of the canal,

"on Section 11. It would be a portion of the east half.
 "I sowed those lands I speak of in grain. Then I went
 "down on Sec. 3 and 33, ran through all these sections
 "and examined the lines and corners as marked by Mr.
 "McCray. I think in Sec. 3 I ran down; left Sec. 2
 "and ran out. My roadway is there yet. I think it
 "runs, leaving the canal at Section 2, where the east
 "line of the canal runs through. I ran through Sec. 3
 "and off to the line, striking the canal about a mile
 "below the corner of Sec. 33 and 34, the township line
 "as well as the section line. I followed that section
 "line then to my camp, which was on Buena Vista
 "Slough, at the end of the cut which is marked Central
 "cut.

"Q. What was the cut? Is that cut there in your
 "land?

"A. *The design of that cut was to convey the waters
 "across the flat. In the slough there was a break—a
 "place wide and flat. There was no slough to amount
 "to anything. I designed running this water to my
 "canal, which I did. I made a roadway, and on either
 "side of that roadway I had a canal to conduct the wa-
 "ter down along these lands—to throw it on the lands
 "or off the lands.*

"Q. *Could the water run through the slough at that
 "point?*

"A. *Well, it spread. The water, when it got to this
 "point, the water spreads all over the country.*

"Q. What point is that?

"A. This upper point of this cut marked 'Central
 "cut,' that terminated on the line between Sections 3
 "and 4, and ran down to the northeast corner of Sec-
 "tion 5. When the water flowed down this slough
 "here—this crooked slough here, as you see marked on
 "the map—and got to that point—that is, the southeast
 "point of the central cut, as marked on Map D, it spread
 "to the south. The water came from off here, a large
 "portion of it. Some of it went along down there
 "through this land, apparently right in here" (pointing

on Map D). "It was right in the flat slough or channel there, as marked. Though that slough or channel had banks, principally on the north side, if I remember right, *there was very little bank, if any. In places there was a small bank on the south; but generally it flattened out to the south, and that being lower caused the water to run off here and flow down that south line. The water would overflow to the south of that point.* I plowed some in Sections 33 and 32, in T. 29, R. 24. I put in some corn and pumpkins there on those sections. I have left there. *The water drove me out.* I went outside and purchased a little house from Mr. De Weber. This is on Section 20, on the same township.

"Q. You say the water drove you out. Didn't you raise a crop there?

"A. No, sir; the water flooded the crop. Before I left it, or about the time I left it, the water was coming over the land, over the corn, etc., that I had planted.

"Q. Was the water that was coming over there, flowing in any channel at all?

"A. Well, *it came in on me from the east.* The water apparently had been turned out here. When I commenced my roadway, the water was flowing all through this country here." (Referring to Map D.) "It spread over that portion of the country. When I threw in my levee here there was a low place up here, a low place in the ground. I didn't get the levee high enough, and the water ran over it. That came behind here and all through that entire country. So much so, that it drove me out. I had to leave; to go out to dry land. The slough was filling up.

"Q. *What do you mean by the slough, Mr. Souther?*

"A. *I mean that tract of swamp and overflowed land.*

"Q. You are not, in the use of that word, referring to any particular channel, are you?

"A. No; *there was no particular channel, or rather, the water came down the channel until it reached a point*

"just below the head-gate, perhaps about half a mile. There
"are some depressions there. We termed them sloughs
that ran from the canal on the east side back to the
"east line of the canal here. Those were what we termed
"the slough. It was a depression in the land that ran
"back there. The water, when it got back there,
"flowed out into this channel. That bank is lower than
"it was here—back in the main described channel
"here. It went off here, instead of following that
"down, and that is the water that troubled me. When
"the water was turned through that head-gate, a few
"rods above the camp, into this slough—into Buena
"Vista Slough—it ran down in here somewhere. I
"never was there from the fact that there was so much
"water there. I could not get by it. I went down to
"the west side to the west bank. It was not all the way
"down. But the bank was low there and it threw it out
"here. The water came in here to the bank of the canal.
"I threw the water right up against the east bank of the
"canal. It flowed down in here through that break in the
"slough there where McCray left the break in the slough;
"the depression there was low to the east. That is in Sec-
"tion 15, Section 14. It must be 15, in Township 30,
"Range 24. The water that came up here to the east,
"flowed back in this depression until it struck the east
"line of canal in Section 11. Then it flowed down all
"over that country there, from there clear to the slough.
"There was so much water that I tried several times to
"get through there, and usually failed to get through.
"Once or twice I made it through there. The whole
"country was inundated there; all through that portion
"there down to 3, and into Section 3. It didn't take
"much of a levee to force the water back. I made a
"ditch. The levee, of course, made a ditch on both
"sides. I did not succeed in my farming down there.
"The water finally got all over the country so that I
"could not easily get in, and I became a little disgust-
"ed with the country down there and left it. That was
"in 1878. I think I left there in May. There was

“ plenty of water down there then. At that time Bonestell was living down there.

“ Q. Did he have any water down there?

“ A. *Well, he had some water. There was a little water in the slough. A little had run down in the slough at the first rise. It was either in January or February. I disremember the exact time that the water come down. It was about that time, though. I was there off and on all through February and sometimes in January. It was about that time. At the time I was being flooded out at my place, the water had not reached Bonestell yet. One cause of the flooding was that Bonestell went up to Wible—I had spoken to Mr. Wible not to turn in any water, if he could get around it. Mr. Bonestell came and asked him if he would not turn him in some more water, he was short; his crops were failing. He turned the water on and that increased the water on me, and it spread out.*

“ Q. The water had spread out over the country before it got down to Bonestell's?

“ A. A pretty large proportion of the water ran to the east line of canal and went down that portion of the slough. When it got to the upper end of this central cut, as marked on this map, there it ran then off to the side. It took a large body of water in order to get it down the slough enough so that Bonestell could irrigate with it. Hence, when they turned it in on Mr. Bonestell to supply him, it flooded me out.”
(T. III, fols. 668 to 688.)

April 28, 1881, Macmurdo and Fillebrown, starting from the S. E. corner of Sec. 28, T. 29 S., R. 24 E., and taking a course south 16 degrees west, completely traverse the swamp.

MACMURDO says:

“ On the line from the southeast corner of Section 28 we ran through Section 33, into some portion of

“Section 4, T. 30, R. 24. We found water spread out
“over the ground, so that the animals could not go any
“further; they bogged down. We sent the wagon back,
“and Mr. Fillebrown and myself continued on through
“the swamp with those levels; ran across the swamp
“until the tules got so thick that we could not get
“through very well, and the water seemed to spread
“out there very wide; so we took the level of the water
“surface, and made it as nearly at right angles to the
“swamp as we could, to the eastern margin of the
“water, which was spread out. When we reached this
“point on Section 4, somewhere in Section 4, I
“cannot say exactly where it was, the water was
“spread out over the ground; was just seeping and
“running along; it was not an inch deep in most
“places; just enough to spread out. We went on
“through that until we reached a pond of water that
“seemed to be about knee-deep. That was on Section
“4, still keeping on the same course. Up to that point
“we kept the course. Then the weeds and tules were
“so high in our direct course that we had no way to get
“through them; we could not carry the wagon to mash
“them down; we went around through an opening, a
“slight depression in there. The wagon left us when we
“first struck the water, before we got to this point.
“Here we made a deflection north about 200 yards.
“Then we went on as nearly our same course again
“as we could, from that point. We could not get back
“to it, exactly. We were going through this water
“knee-deep until we came to where the water was run-
“ning. We took the surface of the water there, of the
“depth of it, which was the deepest water we found in
“the swamp in crossing. I don't remember the exact
“depth. I think it was nearly waist-deep. It was 2
“feet 7, I think. That was the deepest water we found.
“We had gone through the water, I should judge, about
“half a mile. We took the level of the water there,
“and then went through and took as nearly the same
“course as we could to the west margin of the swamp;

"and when we got near to the west margin of the
 "swamp, we found the edge of the water, and then we
 "continued on in the same way, the same course, sound-
 "ing the depth as we went along. Its greatest depth
 "was 1.4. Where we struck it it was 2.7, I think—
 "about waist deep.

"Q. How wide was the deepest water?

"A. It was probably 300 or 400 yards wide—wider
 "than that. Where we first struck the point knee deep
 "was first a continuation of that water. The surface
 "of the water was the same all the way through there,
 "and it got deeper and deeper until we got to this
 "point. Then we went on westward, and the next
 "deepest water we came to was 1.4, and it ran from
 "there to nothing; there we reached the western mar-
 "gin of this water.

"Q. How wide was the whole body of water you
 "crossed there?

"A. I think it was a mile, or a mile and a quarter,
 "from where we first struck it." (T. IV., fols. ~~1116~~ to 1114 to 1121
~~1120.~~) *Vide* also testimony of Fillebrown as to this
 same crossing.

L. Crusoe, T. IV. page 51, *et seq*; W. R. Macmurdo,
 T. IV. p. 286, *et seq*; T. R. Fillebrown, IV. p.
 64, *et seq.*, each describe the water as they found it May
 14th and 15th, 1881, spread out for a mile or more in
 width over the surface of the swamp at its southern end.
 We have already referred to the testimony of McClung,
 McLean, Reading, Thornton and others of defendant's
 witnesses who made the exploration of the swamp dur-
 ing the early part of 1881, descriptive of the spread of
 the water from the east to the west side of the swamp,
 through Sections 10, 9 and 8, T. 28, S. R. 22 E., and
 we know by the testimony of these several witnesses, as
 well as by that of several others, that neither of these
 bodies of water was flowing in any defined course or
 channel, but on the contrary they were each spreading
 generally and indefinitely over the swamp.

Now, let us see what volume of water has reached the swamp to spread in this indefinite way.

The greatest volume of which we have any record, which could by any possibility have reached even the head of the Kern Valley Water Company's Canal, through which it must pass before entering the swamp, is that measured by Col. Mendell on the 17th and 30th days of April, 1881. His first measurement gave 185 cubic feet, and his second 438 cubic feet per second.

Assuming that all this reached the swamp, let us see what portions of it have contributed to or fed this southern pool described by Crusoe, Macmurdo and Fillebrown.

April 20, 1881, there was $17\frac{1}{2}$ cubic feet per second passing through the waste gate at the head of the Canal. (T. IV., fol. 252.)

May 1, 1881, through the same gate, there was 111 cubic feet per second. (T. IV, fol. 1058.)

May 9, 1881, through the same gate, 95 cubic feet per second, (T. IV, fol. 1058,) and on the same day (May 9th) there was 18.7 cubic feet per second discharged into the east side canal, (T. IV., fol. 1060,) making a maximum of 113.7 cubic feet per second which discharged into the swamp at its head.

From the testimony of these witnesses, who have watched the waters spreading over the swamp, and have taken actual measurements of the amount of water entering the swamp, it is incontrovertible that whatever waters now reach the swamp spread and squander themselves over the surface thereof, and do not flow in any defined course or channel.

We have already seen by the testimony of Godey, Barker, Hudson and others of plaintiffs' witnesses that from as early as 1854 the sloughs and channels within the swamp have ever remained the same. That being so, it of necessity follows that whenever in former years the water reached the swamp, whether from overflow

of lake or river, or from direct flow, it there spread itself the same then as now.

Now, these same witnesses of plaintiffs, Barker and others, assert positively that during all those years, whenever they visited or saw this Buena Vista swamp, the waters therein were, except in very rare times of excessive floods, confined to the channels and within banks averaging from sixty to one hundred feet wide. Such testimony proves beyond a doubt, first, that the waters of the river or of the lake are not wont or accustomed to flow to Buena Vista swamp, and do not reach the swamp unless in times of overflow from flood or freshet; second, that such overflows of the river or lake are but rare.

We do not dispute the fact that water at times does flow from one hole to another in the swamp.

C. W. CLARKE (for plaintiffs) says, that through the body of swamp between Tulare and Buena Vista Lakes there is a great deal of soil that is very black and rich; that this soil is formed from the decomposing of vegetable matter; that underneath this soil is a kind of quicksand; that the land itself is a mere surface deposit. (T. II., fols. 1193 to 1195.)

MILTON NORTON (for plaintiffs) says:

"The land along Buena Vista Slough is some kind of 'an adobe and a kind of rotting vegetation.'" (T. II., fol. 1729.)

GODEY (for plaintiffs) says, that in September, 1866, about the middle of the swamp, he found two long holes of water and a little water running between the two. (T. II., fol. 126.)

HUDSON (for plaintiffs) says, that in his trips through the swamps he always found running water

every time he was there. *Not the whole way, but at different points.* (T. II., fol. 2089.)

BARNES (for plaintiffs) says that :

"In 1880 the whole of Buena Vista Lake drained right down into these holes, into Buena Vista Slough into the channels of what we call Old Buena Vista Slough, between Buena Vista and Tulare Lake." (T. II., fol. 1372.)

We know from the testimony of nearly all the witnesses, that no surface water flowed out of Buena Vista Lake in either 1879 or 1880.

R. L. DIXON (for defendant) says :

That at times the water will rise in these holes and flow from one to another, and he mentions several occasions when he has seen this rising of the water, at times when there was no water running either from the river or the lake. (T. III., fol. 532.)

JAMES (for defendant) says :

"Q. Were you along Kern River much of the time in July, 1879?

"A. In 1879 I was along the river a great deal.

"Q. Was this the time that you say the water was running a little towards Wible's headquarters?

"A. Yes, sir.

"Q. Was there any water in the river at that time?

"A. No, sir; there was only a little water running in places from one hole to another; I could see the water running; I am speaking now of the slough; there was no water in the river at that time." (T. III., fol. 168.)

CROCKER says that there are holes in the slough which he has never known to be without water.

As to the flow of the waters within the swamp:

ELISHA STEVENS (for plaintiffs),

Having said that after reaching Kern and Buena Vista Lakes, the water went to Tulare Lake, is asked:

"Q. How did it get there?

"A. I caught fish along there. It looked like fish
"would not come there without water. In dry weather
"it was not all of the way, but in many freshets the
"water would come through and bring fish to Buena
"Vista Lake, but not always. There were many holes
"of water both sides from Tulare Lake." (T. II.,
fol. 139.)

F. A. TRACY (for plaintiffs):

"Q. Now, you have been down there and are famil-
"iar with it ever since 1863. Isn't it a fact that there
"has been, taking one year after another, a matter of
"uncertainty whether there would be any water run-
"ning down there the greater portion of the year?

"A. It has been a matter of uncertainty; there are
"certain years it did not run, since I have been ac-
"quainted with it."

As to the name "Slough."

That the name "Buena Vista Slough" is usually ap-
plied to Buena Vista Swamp appears so frequently
throughout the whole testimony by the mere fact alone
of the various witnesses making use of the word
"slough" when they mean the swamp, that we deem it
unnecessary to make special reference to any testimony
thereon other than that of Souther.

"Q—What do you mean by the 'slough,' Mr. Sou-
ther?

"A—I mean that tract of swamp and overflowed land.

"Q—You are not, in the use of that word, referring
"to any particular channel, are you?

"A—No. There was no particular channel."

In concluding this branch of the subject, we will call
your Honor's attention to the testimony of Macmurdo

relative to the flow of sand in the river and in the slough:

"The Court—With the permission of the counsel, I would like to ask the witness a few questions:

"Q. Have you observed this river, say from the Railroad Bridge down to where it passes into Buena Vista Slough?

"A. Yes, sir.

"Q. How is the bed of that river? Does the water carry much sand in flowing?

"A. Yes, sir; it carries a good deal of sand.

"Q. It depends upon the stage of the water in the river?

"A. If the river is high, of course the current has a greater velocity, and carries more sand.

"Q. At the forks of the river—the south, middle and north branch—is there much movable sand at this point?

"A. Yes, sir. The current of the river varies at times of high water by reason of the action of the sediment and sand flowing.

"Q. Have you ever observed the slough, whether there is much sand in the slough?

"A. At a good many points in the slough I have noticed a great deal of sand. I have noticed the difference in the elevation of these sand-bars in the slough at many times.

"Q. Does this sand, this sediment that flows with the water, run down immediately below what is known as Wible's Camp?

"A. I don't think it reaches as far down as that. It reaches a point some distance between where the middle branch enters the slough and Wible's headquarters camp.

"Q. Does the sand flow northwardly from the south branch in the slough?

"A. It does at present, or did at the time when the

"levee was closed up across Cole's Bridge." (T. IV., fols. 1387 to 1390.)

On cross-examination Macmurdo says:

"The waters of Kings River carry sand into and down Buena Vista Slough. But I cannot definitely fix the point where it ceased to carry sand. I think it is somewhere on Sec. 23, T. 30, R. 24. If there is any sand carried below there, I think it has only been recently. I was along that part of the slough several years ago, hunting, and crossing at various times, and I don't remember having seen any sand in the slough below that point. If there was any sand in the water I would possibly have known it." (Fol. 1403.)

Having now shown that plaintiffs' lands are, in no sense situated along or upon any stream or water-course, we will dispose of plaintiffs' remaining objections to the several findings in the same brief manner that plaintiffs announce them.

In support of Finding 16, we refer to the testimony of J. C. Crocker, plaintiff. (T. II., fols. 515, 516.)

In support of Finding 23, we refer specially to the testimony of E. M. Roberts, for plaintiff. (T. II., fol. 283.)

In support of Finding 38, we refer specially to the testimony of Schuyler and Macmurdo, who both state that willows and other trees, etc., grow in the bed of the river, the same above the heads of all the ditches as they do below the ditches; and to the testimony of Wible, who states that the growth of willows and other trees in the channel of the river is attributable, not to the taking out of the water, but to the putting in of brush and stakes.

In support of Finding 40, we refer specially to the testimony of Fillebrown, James, Hope, Souther, Conner, Ellis, Stoner, C. C. Stockton, J. D. Stockton, Brown, McFarland, Colton, Macmurdo and Wilkinson, showing the usual condition of the lakes subsequent to the formation of New River, and to the testimony of Hudson as to their condition prior to that time.

In support of Findings 51, 52, 55, 56, 57, 60, 61, 73 and 74, Maude, Anderson, McCord, Souther, McFarland, Jackson, Dumble, Davidson, Roberts, Carr, James, Macmurdo, Fillebrown, and many others, testified fully to the facts therein found.

In answer to plaintiffs' particular objection to Finding 61, as to the amount of land which may be irrigated by the Calloway, we refer specially to the testimony of Walter James (T., IV, p. 221).

Finding 62 is supported by a large mass of testimony both on the part of plaintiffs and on that of defendant.

Findings 63 and 64 are amply supported by the evidence. We, however, make special reference to the testimony of James C. Crocker. (Trans. II., pp. 165 to 168.)

In answer to plaintiffs' objection to findings 68 and 69, the testimony of Wible, Crocker, Macmurdo, James, Fillebrown, and many other witnesses, both of plaintiffs and defendant, show conclusively that all the waters flowing northward down Buena Vista Slough, from any point south of the Kern Valley Water Company's canals, are intercepted at the head of said canals by a levee thrown completely across the swamp and the slough, and there taken possession and control of by the Kern Valley Water Company.

Findings 75, 76 and 77 are amply supported by the evidence, as to the amount, volume and sufficiency of water reaching Buena Vista Swamp since the construction of the dam and levee at Cole's Crossing. We refer to those witnesses who have testified as to Buena Vista Swamp, and as to the flow of the waters of Kern River.

“ ASSIGNMENTS OF ERROR.”

The first assignment of error in Appellant's “Points and Authorities,” p. 3, merely involves the general question of Riparian Rights in this State, which we have noticed *supra*. So with regard to that on p. 6.

As to that on pp. 7 to 13, the same remark applies. The matter objected to was also pertinent in equity as bearing on the question of laches, remedy at law, etc.; and if it did not constitute a defence, and should have been stricken out, it was not an assignable or reversible error, because the other points involved are decisive of the case, and the findings and decision thereon could by no possibility be affected by those rulings.

As to that part on pages 13 to 17, “Points and Authorities of Appellant,” the same observations apply. It is apparent that the facts pleaded should be before a court of equity, in order to a full understanding and proper disposition of the case. Besides a good defence is then pleaded. If others had a valid right to the water, the plaintiffs could not sue for a deprivation of it. The case would be no stronger if we had pleaded that that much of the water, in its natural flow, went in another direction, and never could have reached plaintiffs' lands; and if the surplus, to which alone they could make any pretence of claim, would not have reached the lands of plaintiffs if left to its natural flow, they cannot complain of its diversion. Moreover, the plaintiffs themselves first introduced as an element in the case by its evidence in opening this question of the other canals and water rights.

The part on pages 17 to 20 of “Appellant's Points and Authorities” falls under the same head, and in addition, sets up a good defence, if proven, to wit, a license from those entitled. If not proven, it cannot affect the result properly reached on other and independent defences.

The part on pages 22 to 24 bears on the general

equity of the bill, and the refusal to strike it out is also immaterial in view of the findings and decision. If no testimony was introduced in its support, the appellants could not be prejudiced by its retention. For the same reason it matters not whether there were any findings thereon.

The point (p. 32 Pts. and Au.) as to sustaining objection to question asked Tracy, (Trans., vol. II, f. 1027-8,) it is answered that the question was leading, was not re-examination, and was improper as calling for a mere opinion, and an opinion on an irrelevant matter. They might as well have asked him if he could have drank it all up in a year.

The question asked Jewett (Pts. and Au., p. 32) was proper. On direct examination they had questioned the witness about Baker's building the dam (Trans., II, f. 1222 *et seq.*) in A. D. 1865. They had attempted to deraign title through Baker by deed dated A. D. 1870. (Trans., II, fols. 3 and 77.) What their grantor, Baker, theretofore said on this very subject was therefore proper. But in view of the other testimony, and as there was no dispute about these facts, and as they did not and could not affect the controlling findings, it could not be reversible error.

As to the report of Davidson (Pts. and Au., p. 33, III.), it was admissible on cross-examination, but that question need not be determined for (T. II, f. 1547) we offered to, and requested the Court to strike it out, and the motion was denied at the request of appellants. It is needless to cite authorities, as they are all one way; that when on trial before the Court evidence has been improperly admitted, it may be withdrawn—the Court may even strike it out on its own motion.

As to the photographs (Pts. and Au., p. 33, IV.), they were admitted so far as proper. They should not have been received to show measurements, because the evidence showed, that on account of the perspective, they were not reliable for that purpose, involving nice mathematical calculations to reach a result which could

be attained by better evidence—to wit, actual measurement. And, in fact, the actual measurements were put in whenever desired. Besides, it was immaterial as to the exact measurements at these points.

The objection (Pts. and Au., p. 33, V.) to the question to Crocker as to his authority was properly overruled. The witness had already given the same testimony without objection (Trans., II, f. 2362). Also it was admissible on cross-examination to show the relations between the parties, and to sustain the evidence of acquiescence. In no event could the answer have prejudiced the appellants. As to the power of attorney itself, the further objection is made that it was not proven. But (Trans., II, f. 2368) it was duly acknowledged, and so was good at least as to one of the plaintiffs.

The objection (Pts. and Au., p. 34, VII.) to striking out portions of Crocker's testimony, is answered by a reading of the transcript (vol. II, f. 2383; vol. III, f. 130, *et seq.*; vol. II, f. 2379). Plaintiffs asked leave to ask a single question to show how long Crocker was in possession. The question was asked (f. 2383), and the answer, so far as it went beyond the question and the permission, was properly stricken out, both as not responsive and as giving not a fact, but the opinion of the witness on questions of law.

As to the objections to the notices of appropriation introduced by us, none of them could in any way affect the result, except that of the Calloway. But they are all without foundation. We did prove the loss of the originals where they were not produced by the usual evidence in such cases.

Vide Dunning vs. Rankin, 19 Cal., 640.

It was not necessary to prove the signatures to the originals. It was not even necessary that they should be signed at all. C. C., 6415.

We did prove the posting. The notices did not need to be acknowledged, and as to the affidavit in the Cal-

loway notice, it was admissible as it was received as part of the record, not as proof of what it deposed to be. The record, under the Code, is admissible itself, independently of the original, to prove compliance with the law.

We had a right to prove the amount of land irrigated as bearing on the right to equitable as distinguished from legal relief; and if we had not, it would not affect the findings and decision on the merits. The question asked the witness McLean (Appellants' Pts. and Au., p. 56, XI), was admissible in contradiction of Wible, and the proper foundation was laid. The whole tenor of Wible's testimony was that the canals were injuring the slough, and it was proper to contradict him by showing that his own actions conflicted with his evidence. Besides, Wible's connection with plaintiffs was such as to render it proper to impeach his good faith and sincerity, and when they introduced him to show damage to their land, and he endeavored to make out for them that they were suffering for water, we had a right to show, by his own acts and admissions, that the contrary was the fact. If there was any error in admitting the report of Wilkinson and McFarland, it was cured by its withdrawal before the witness left the stand.

As to the testimony of Mendell and Schuyler to amount of evaporation, it was properly admitted. They testified, in effect, that from their knowledge and experience, they could give the amount with sufficient certainty, without the data objected to. But the only data really used were those taken at Visalia and Sumner, and they testified that the distance they were taken from Bakersfield would not vary the result to appellants' injury—could not make their calculations too high.

See Trans., Vol. III, fols. 995, 1022-1025, 1038, 1038-1056, 1042, 1058 *et seq.*, 1060, 1063, 1075, 1079, 1080, 1082, 1091; p. 275, fols. 1100, 1101, 1103-1105, 1373 *et*

seq., 1517 *et seq.*, 1564, 1566, 1571, 1573, 1581, 1583, 1707—that the records from Visalia were official and therefore *prima facie* evidence. See Rev. Stat. U. S. P., 35, and evidence of Mendell *supra*.

The evidence of Carr, objected to (Appellant's Pts. and Au., p. 63, XXI.) was admissible to contradict Wible, the proper foundation having been laid.

Mr. Wible had testified for the plaintiffs in reference to building the canal he superintended, and that it was to be used to turn the water on to plaintiffs' lands for irrigation, etc. He had testified as to the effect of the Calloway and other canals in filling up and destroying the channels below. He had testified (T. II, f. 1815) as to the flow in the swamp and sloughs in 1878, and the effect of his testimony was that, by reason of the Calloway Canal, etc., there was a scarcity of water below and in the canal he superintended. To countervail the impression this testimony was intended to convey, it was proper to ask him if he had not acted in 1878 as he would not have done if such were the facts. Accordingly (T. II, fols. 2099 *et seq.*), the proper foundation was laid by asking him if at a certain place (2103), in 1878, he did not request Carr to take the water off, and to contradict him if he denied it. The testimony was also admissible for other reasons. The testimony of Carr and Calloway was plain *res gestae*.

We have endeavored to notice all the points and authorities served on us, so far as we could in the few days' opportunity afforded by the rules. But as the points and authorities are so bulky that we may not have sufficiently noticed all of them, we beg not to be considered as admitting the validity of any of them.

In relation to the title of the appellants, the Montgomery grant was a grant on condition precedent, *Montgomery vs. Karson*, 16 Cal. 94, and by statute of 1878, expressly declared that the title by judgment

should vest "as of the date of the judgment." The judgment in favor of Miller and Lux and Crocker is of date A. D. 1878.

As to the claim that without the certificates of purchase the title by patent relates back ten months before the date of the patent, it is disposed of by the case of *Osgood vs. El Dorado Company*, and even without the aid of the principles there applied, is untenable.

As to the rejection of the proof of lands irrigated, by the records made by Dixon, it affirmatively appears that it was hearsay. This record was not at all like that at Visalia. There the party making the observation—knowing the fact—made the record. Besides, taking the excluded evidence into consideration and according to it absolute verity, would not vary the result in any view of the case; and this, we think, may fairly be said of most of the errors assigned—of all except those we have fully noticed.

THE UNIVERSITY OF CHICAGO

LIBRARY

1100 EAST 58TH STREET

CHICAGO, ILL. 60637

TEL. 733-4331

1968

1969

1970

1971

1972

1973

1974

1975

1976

1977

1978

AUTHORITIES.

A

This case is ruled, and the judgment below must be affirmed upon the authority of Osgood vs. The El Dorado Company, 56 Cal., 574.

The complaint alleges not only that the plaintiffs' title accrued as late as 1876, but expressly shows that it could not have accrued sooner, because it is averred in terms that until after that time the title to the lands now claimed by the plaintiffs, and all of them, was in the State of California.

The complaint also alleges an appropriation and diversion of the water on the part of the defendants in the year 1876.

The finding of the Court, which is sustained by all the testimony bearing on that subject, is, that in strict compliance with law and custom, the Calloway appropriation was commenced in the year 1875, before the plaintiffs had any right, title or interest whatsoever in the lands they now claim—a diversion of water from, which they seek to enjoin.

Assuming, then, that the case of *Osgood vs. The El Dorado Company* correctly declares the law on this subject, it will be sought to take this case out of the operation of that decision, we apprehend, only upon the following distinctions and propositions:

First—It will be contended that the lands in reference to which riparian rights were claimed in the *Osgood* case were public lands of the United States, and the plaintiffs' title thereto came from a pre-emption right, and was evidenced by a pre-emption patent; while

in this case the lands in connection with which riparian rights are claimed, was a part of the swamp and overflowed land granted to the State by the General Government in September, 1850, and the title of the plaintiffs thereto comes, not through the pre-emption patent directly from the Federal Government, but through a patent issued by the State upon a purchase from the State of a portion of this swamp and overflowed land. But this is a distinction which can make no difference in the application of the principles underlying the Osgood case.

If then these lands in question belonged to the State at the time of the appropriation of the Calloway by the defendants and their grantors, that appropriation gives a right as against a subsequent purchaser of the swamp land from the State upon exactly the same principles, and for exactly the same reasons that the appropriation in the Osgood case gave a right as against a subsequent patentee from the United States Government.

It may also be contended that though the decisions show this to have been the state of the law prior to the Code, yet, that by reason of the Code, and by the insertion therein of the saving of riparian rights, a change was wrought in the law of California upon this subject. But this cannot be so; among other reasons, because the Code was, and professed to be, an expression of the then existing law; and because to give it the construction contended for by the appellant would be simply to make nonsense of the greater portion of the Code devoted to this subject, would be to declare that a statute passed for the avowed purpose of giving and regulating the right of appropriating waters, denied from and after its passage the possibility of making any such appropriation.

The very statute creating the Code Commission shows that such a radical change would have been entirely without the scope of the authority intended to be conferred. It says the Commission is created for the purpose of revising and compiling the statutes of this State,

and empowers the Commissioners to "revise all of the
 "statutes of this State, * * * correct verbal
 "errors and omissions, and suggest such improvements
 "as will introduce precision and clearness into the word-
 "ing of the statutes; and by a supplemental report
 "thereto to designate Acts to be repealed, and to pre-
 "pare substitutes and recommend such enactments as
 "they may deem necessary to supply the defects of
 "and give completeness to the existing legislation of
 "the State, * * * and to arrange the statutes
 "in the most systematic and convenient form."

By Section 5 of the Civil Code it is enacted that
 "the provisions of this Code, so far as they are sub-
 "stantially the same as existing statutes or the common
 "law, must be construed as continuations thereof, and
 "not as new enactments."

Our Code is modeled upon, we might say almost bod-
 ily taken from, that of New York. The authority of
 the New York Commissioners, indeed, was broader, ex-
 tending to a revision of all the statutes, and not con-
 fined to the statutory law. In New York the authority
 was given by their Constitution; yet they say in their
 introduction, showing their notion of its scope: "The
 "more perfect a digest becomes the more nearly it
 "approaches the Code contemplated by the Constitu-
 "tion."

In speaking of their Civil Code they say: "All that
 "it professes is to give the general rules upon the
 "subjects to which it relates, which are now known and
 "recognized, so far as they ought to be retained, with
 "such amendments as seem best to be made and sav-
 "ing always such of the rules as may have been over-
 "looked. In cases where the law is not declared by
 "the Code, it is to be hoped that analogies may never-
 "theless be discovered which will enable the Courts to
 "decide."

Austin says, in his Jurisprudence, Vol. 2, page 118

“In like manner, codification does not involve any innovation on the matter of the existing law. To imagine the contrary is a mistake often made by the opponents of codification. They often suppose codification to mean an entire change of all the law obtaining in the country.”

Every word in the portion of the Code referring to appropriation and riparian rights can be given its full effect without imputing any intention, in any manner, to change or alter the pre-existing law, in so far as any question arising in this case is concerned.

The doctrine of the right of prior appropriation and diversion of water from water courses on all of the public land, both of the state and of the nation, had been, as the decisions show, recognized as the law of California ever since the organization of the State in 1859, and previously thereto.

Under and in reliance upon that doctrine, rights of immense value have vested, and it is not to be believed for one moment that it was the intention of the Legislature, in adopting the Code, to reverse the policy of the State from the organization of the State, and entirely abrogate those rules which had grown up in the State of California, and which were necessitated by the wants of the people.

If, then, the doctrine of *Osgood vs. The El Dorado Company* applies equally to the case of a subsequent acquisition of title to State lands or swamp and overflowed lands, it seems to us the finding of our prior appropriation is necessarily conclusive, and entitles us to the affirmance of the judgment, regardless of all other questions which arise upon the record, unless this Court be of the opinion that an error was committed by the Court below in refusing to allow the plaintiff to introduce as rebutting evidence, the certificates of purchase, offered to carry their title back by relation so as to antedate the appropriation of the defendants. Because the other assignments of error, even if well founded, can none of them

affect the decision of this question; and this question thus decided is necessarily decisive of the whole case.

We contend that the ruling of the Court below in excluding the certificates of purchase was correct, and that it was not rebutting testimony. The plaintiffs in their opening, did not confine themselves to proving their legal title by the introduction of the patents for the land, issued in 1876 and later. They did not rest their case upon that proof of strict legal title. But, in the opening of the case, they endeavored to prove a right antedating our appropriation by showing that prior to our appropriation they and their grantors had had the actual possession of the premises through which the water course is claimed by them to have immemorially flowed.

They introduced witness after witness in the attempt to prove a possession many years antedating our appropriation; that is, they anticipated our case, of which case they were well apprised, not only by our pleading, but by their own complaint, and endeavored to overthrow it by proof of a prior riparian right in themselves.

The failure to offer the certificates of purchase in their opening case and before they rested, was no oversight, but was clearly the result of a deliberate purpose; the reason being evidently that the certificates of purchase, or the land covered by the certificates of purchase, would not, even if admitted and held valid, have established the right which they wished to maintain. Even on their own theory as to the existence and locality of the water course through the swamp, if they were confined to the lands covered by the certificates of purchase, they could not have made out such a riparian right to the water, or that they were riparian proprietors to such an extent on the water course as would have justified the decree they sought.

The question then on the assignment of error in rejecting these certificates when offered in rebuttal, is simply this; whether the plaintiff, upon whom lies the

burden of proof to establish the alleged title, can rest his case by introducing a portion of his evidence tending to establish his title, and then, after the defendant has introduced his proof in denial of the title, mend his case by afterwards introducing other proof simply cumulative of the case attempted to be made in the opening.

Having assumed in the opening the burden of showing, and having attempted to show, not only their title from and after the date of their patents, but a right antedating the patents and antedating our appropriation, upon every principle they were compelled to exhaust all their proof upon that subject in their opening, and could not afterwards introduce it as rebutting testimony.

“That is not rebutting testimony which mainly supports the case stated in the complaint, and only incidentally goes to explain or repel the evidence in behalf of the defense. *Smith vs. Richardson*, 2 Utah, 424. Having rested his case, and the plaintiff having closed his testimony, the defendant had no legal right to re-open his own case and introduce evidence to sustain his defense which he might have introduced when the case was with him. No rule for the conduct of trials is more familiar than that the party holding the affirmative is bound to introduce all of the evidence on his side before he closes. *Hastings vs. Palmer*, 20 Wend., 225. He must exhaust all of his testimony in support of the issue on his side, before the testimony on the opposite side has been heard. *Ford vs. Niles*, 1 Hill, 301. *Rex vs. Stimpson*, 2 Carr & Payne, 415. He can afterwards introduce evidence in rebuttal only. Rebutting evidence in such cases means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. *Silverman vs. Foreman*,

“3 E. D. Smith, 322. 2 *Carr & Payne*, 416. In
 “the present case, after having testified to one con-
 “versation, which was denied on the other side,
 “the defendant was not entitled as matter of right
 “to prove another as to which he had not previously
 “testified, even though it tended to support his original
 “statement. This was not evidence in rebuttal. The
 “testimony on the part of the plaintiff was, that other
 “conversations might have been had, but that no con-
 “versation of the nature testified to by the defendant
 “ever took place. This was a mere denial, and not
 “proof of any affirmative fact which the defendant had
 “the right to rebut. These rules may in special cases
 “be departed from in the discretion of the trial judge,
 “but a refusal to depart from them is no ground of
 “exception.”

In this case it was conceded the defendant had the affirmative of the issue in the question.

Marshal vs. Davies, 78 N. Y., 419.

S. P. McCue vs. Butler, 39 Mich., 185.

“Having elected to anticipate the defendant’s case
 “at the opening, and to rebut it in advance, the plain-
 “tiff should have introduced all his evidence upon that
 “head *then*. Having adopted that course, further evi-
 “dence of the same character could not be considered
 “as rebutting, but merely as cumulative, and in its
 “discretion the Court might well decline to receive it
 “at the time it was offered.”

Casey vs. Leroy, 38 Cal., 699.

Where it was a necessary part of the plaintiff’s case for him to prove that he did *not* ship a lead bar, he rested without evidence on that point. The defendant gave evidence that he *did* ship a lead bar, and plaintiff offered to show in rebuttal that about the time in question he *did* ship a gold bar. Held, properly excluded.

The Court said there was no showing of mistake or inadvertence, nor appeal to the discretion of the Court

on reasonable cause shown; and that "It was testimony that clearly belonged to the original case of the plaintiff, and should have been introduced before he rested; for if it tended to prove anything material, it was that Kohler did *not* deposit a lead bar. A plaintiff has no right to keep back all his testimony, or any material point, until he draws out the testimony of the other party, and then come in with his own. This would give him an undue advantage contrary to the rules of law; and if he does so reserve his testimony deliberately and wilfully, the Courts will not allow him to come in after the defendant rests and make out his case. But whether the plaintiff will be permitted to reopen his proofs or not, is a question which rests very much in the discretion of the Court below." It was not testimony in rebuttal.

Kohler vs. Wells, Fargo & Co., 26 Cal., 613.

Trespass. Plea, justification as Surveyor of Highway.

Plaintiff, in opening, gave evidence of the hostility of the defendant to him, and that the trespass was malicious. Defendant then supported his plea by evidence, and plaintiff offered to show in rebuttal that defendant committed the act, not in the discharge of his official duty, but from malice and hostility towards and design to injure plaintiff. Rejected.

P. C.—"We see no just cause of exception to the rejection of the evidence offered by the plaintiff, in reply. * * * The plaintiff knew from the answer what was to be the nature of the defense. He chose to attack, and, if he could, to disprove it, in advance of any evidence offered in relation to it by defendant, and he was permitted to do so by the Court. No restraint whatever appears to have been put upon him in this course of proceeding. This justly precluded him from the right, without the permission of the Court, of introducing, in reply, and at the close of the trial, merely

“cumulative evidence to the same point. *York vs. Pease*,
“2 Gray, 282.”

Holbrook vs. McBride, 4 Gray, 218.

In *York vs. Pease* supra, the Court said that where the plaintiff anticipates the defense and has introduced what evidence he chooses, he cannot claim afterwards, as a matter of right, to accumulate testimony upon the same point.

“As a general rule in the conduct of trials, if a party
“elects to proceed in the first instance with proof to
“anticipate the defense, he should not afterwards be
“allowed to offer evidence upon the same point in re-
“ply to the case made by the testimony of the defend-
“ant. To permit a party thus to divide his case leads
“to confusion, and gives him an unfair advantage over
“his adversary.”

In a later Massachusetts case it was *held*, that where proper rebuttal also tends to sustain the case in chief, it is *discretionary* with the Court to admit it. But Shaw, C. J., says: “The first exception is founded on
“the rule, that each party, in his turn to offer evidence,
“shall offer the whole which is pertinent, and which he
“means to offer, on any one point of his case. This is
“a salutary rule, and tends to secure regularity and
“fair dealing in the conduct of trials, by giving the ad-
“verse party notice of the strength of the case which
“he has to meet. But the propriety of its application
“in each particular case depends so much upon the
“circumstances of each case, and the actual state of the
“proof at the time it is offered, that it must be left
“almost entirely with the Judge conducting the trial
“to say whether it shall be permitted at that stage.”

Chadbourne vs. Franklin, 5 Gray, 314.

Assumpsit for goods sold.

Plaintiff proved sale and delivery. Defendant gave evidence that the sale was on time unexpired. Plaintiff offered to show in reply that after the time testified

to by defendant's witnesses, and before delivery, defendant promised to pay on delivery.

P. C.—“The ruling, that the plaintiffs were not entitled to offer additional evidence as affirmative proof of their original case, after the evidence of the defendant had been closed, furnished no legal ground of exceptions. If admitted at all, it is a matter within the discretion of the Court, and is admissible under peculiar circumstances requiring it. Its rejection furnishes no cause for exception.”

Macullar vs. Wall, 6 Gray, 507.

After we closed our case, “no evidence, strictly speaking, was competent except such as tended to contradict *new facts proved by our witnesses.*”

Briggs vs. Humphrey, 5 Allen, 316.

In a late New Hampshire case the plaintiff contended that defendants were partners. On their part, defendants introduced evidence of the manner in which the business was carried on, seeking so to show that they were *not* partners. In reply, plaintiff sought to rebut this inference by showing that the same method of conducting business was adopted in other yards. The Court below held that it was proper rebuttal, and for this the case was reversed.

P. C.—“The defendants, by showing the manner in which they carried on their business in that particular yard, undertook to establish that they were not in partnership. They relied upon specific facts as showing how the truth was. The evidence then, to be rebutting, should be confined to the transactions under consideration. It should disprove the particular facts attempted to be shown upon the other side, and should not consist of new matter. The plaintiff might perhaps show such a custom or usage prevailing in this kind of business as would override the facts and be an answer to the position assumed by the defendants. But such evidence would be in the nature of

“new evidence; it could not be regarded as rebutting.”

Foye vs. Leighton, 2 Foster, 75.

In *Hathaway vs. Hemmingway*, 20 Conn., 195, the plaintiff made title to land under an execution. The defense was two-fold: first, no title under the execution, because of a sale under a prior execution; second, a conveyance by the plaintiff. Defendant only put in evidence on the first branch of his defense. This the plaintiff rebutted by showing fraud in the prior execution.

Defendant then offered to give proof of the second branch of his defense; but the Court held it was clearly testimony in chief, and came too late.

P. C.—“The rule upon this subject is a familiar one. “When by the pleadings the burden of proving any matter in issue is thrown upon the plaintiff, he must, “in the first instance, introduce all of the evidence “upon which he relies to establish his claim. He cannot, as said by Lord Ellenborough, go into half his “case and reserve the remainder. *Reese vs. Smith*, 2 “*Starkey C. A.*, 31. *Rex vs. Beezely*, 4 Car and Pa., “220. *Brayden vs. Goulman*, 1 Monroe, 115. *Rex vs. “Stimpson*, 2 Car and Pa., 415. *Knapp vs. Haskell*, 4 “*id.*, 590. The same rule applies to the defense. “After the plaintiff has closed his testimony the defendant must then bring forward all the evidence “upon which he relies to meet the claim upon the part “of the plaintiff. He cannot introduce a part and reserve the residue for some future occasion. After he “has rested neither party can, as a matter of right, “introduce any further testimony which may properly “be considered testimony in chief.”

S. P.—*Storey vs. Sanders*, 8 Humphrey (Tenn.) 663.

Account: Plea of set off.

Plaintiff insisted on introducing evidence that the

set-off had been settled by arbitration. After defendant rested, plaintiff was allowed in rebuttal to prove by other witnesses the same facts testified to by his witnesses in chief, in regard to the arbitration. *Held*, error.

P. C.—“As the plaintiff chose in the first instance to go into evidence to defeat the defendant’s offset, he should then have introduced all his evidence for that purpose, and not cut it up by offering a part then and a part afterwards.”

Williams vs. Jewett, 12 Ind. 310.

Libel. Plea, general issue, and several pleas of justification.

Plaintiff, after proving the libel, called a witness to disprove certain facts alleged in the justification. Defendant then gave evidence in support of his pleas. After defendant closed, plaintiff proposed to call another witness to disprove other facts stated in the justification.

Abbott, Lord Chief Justice, says: “In actions of this nature the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant. But if the plaintiff, in the outset, thinks fit to call in evidence to repel the justification, then I am of opinion that he should go through *all* the evidence he proposes to give for that purpose, and that he shall not be permitted to give further evidence in reply. It is much more convenient, for the due administration of justice, that this course should be adopted; otherwise there would be no end to evidence on either side.”

Brown vs. Murray, Ryan & Moody, 254.

Assumpsit by endorsee of a bill of exchange against acceptor. Plea, traverse of endorsement to plaintiff.

Plaintiff rested in chief on mere proof of the hand-

writing of the endorsement. The defendant gave evidence that plaintiff was too poor to have given value for the bill, and had denied all knowledge of it, or that he had authorized the bringing of the action. Plaintiff proposed in reply to show that he had the means to discount the bill, and, in fact, had discounted it. This the trial Judge rejected. Verdict for defendant on rule nisi for new trial.

Lord Denman, C. J., delivered the opinion of the Court:

"The question in this case was, whether the learned Judge was right in refusing to allow a witness * * * to be called by the plaintiff in reply, upon the trial of an issue whether a bill of exchange had been endorsed. * * * The issue was single, and the onus of proof was upon the plaintiff. He might either rely upon a *prima facie* case, or go into all the evidence he had to confirm the *prima facie* case; but we think that he was not entitled to rely, in the first instance, upon a *prima facie* case upon that issue, and afterwards, when that *prima facie* case was called in question by the defendant, to call other evidence to confirm his *prima facie* case. This we think he was not entitled to do, if objected to, and that the learned Judge was right in refusing to allow him to call the witness." Rule discharged.

Jacobs vs. , 11 Q. B., 419.

The case of *Abbey Homestead Association vs. Willard*, 48 Cal., 619, so much relied upon by plaintiff below was ejectionment. Plaintiff in chief proved a lease from him to defendant. Defendant proved fifteen years adverse possession. The plaintiff in reply was allowed to meet this case by showing that he claimed under a Mexican grant, the patent for which had not been issued long enough to allow the five years to run before the acceptance of the lease, which the Court held stopped the running of the statute. It was argued for the plaintiff that the fact that defendant was in possession

when he accepted the lease, removed the estoppel of the lease, and that therefore the burden of proving title was cast on the plaintiff. But the Court held otherwise, and that by the production of the lease the plaintiff made out a *prima facie* case of title; and then the burden of proof was on the defendant to show title in himself, and that therefore when he proved, or gave evidence of such title in himself by prescription, the plaintiff was entitled to rebut by destroying the prescription, as he did.

In other words, the Court put it like a case where a plaintiff in ejectment proves a *prima facie* title, and defendant meets it with a deed from plaintiff, and the plaintiff in reply shows such deed to be only a mortgage; that is, they put it as if the plaintiff, instead of connecting himself with the Mexican grant, and bringing himself within the exception to the Statute of Limitations, had offered in reply to disprove the facts of possession of which the defendant in making his case had given evidence. It will be observed that the plaintiff, in his opening case, did not go into proof of title at all; and the Supreme Court expressly and carefully put its ruling upon the ground that the burden of proof upon the question of title was with the defendant. Of course, all that the case *decides*, at least, all that it was necessary to decide was, that it was not *error* for which an appellate Court could reverse, to *admit* the testimony in reply—not that it would have been *error* to reject it at that stage and under the circumstances, which circumstances are widely variant from those upon which Judge Brundage here exercised *his discretion*.

See also *Johnston vs. Jones*, 1 Black, U. S., 226.

EJECTMENT—Plaintiff gave in evidence a controller's deed, proved its possession and rested. Defendant showed facts which made the controller's deed void, and rested. Plaintiff then offered to establish a right of recovery by showing title by foreclosure of a mortgage

executed by defendant. Rejected, and affirmed on error.

P. C. "Plaintiff has a right to reply by evidence to "contradict, cut down, modify, explain, or in any way "vary the evidence of the defendant; but beyond this "he cannot go without the permission of the Judge; "not even to supply a defect in his own evidence."

Rex vs. Hildritch, 5 Car & P., 299.

Briggs vs. Aynsworth, Moo. & R., 168-169, note A.

* * * * "The plaintiffs were bound to introduce "all their evidence in the first instance. * * * "A "simple declaration of the plaintiff's counsel that his "proof is closed, or, in the usual phrase, that he rests "his case, cuts him off from all further evidence except "what shall be strictly proper by way of reply. (C. & "H. Notes, 712-718.) * * The introduction of a "distinct substantive ground of claim in reply is not "admissible within any of the cases. * * * Such "a step should be avoided out of a regard to its ill "effect as a precedent."

Leland vs. Bennett, 5 Hill, 289.

In our case the complaint *ex industria* alleges title and possession *at the commencement of the action*; but by specifically alleging title in the state as late as 1876, and *expressly* confining and restricting the allegation of possession to the time of suit brought, while extending in terms the allegation of title in the plaintiff back to 1876, or a year or more before suit, in effect negatives any idea of possession by plaintiff at the time of the injury complained of. Then, when the allegations concerning the damages were withdrawn, the whole case was left to hinge upon *title*, injury to inheritance, etc.

In *Wilbur vs. Brown*, 3 Denio, 360, it is held that in an action on a case for diverting water, the right of the plaintiff must be accurately stated in the declaration. "It is of the utmost consequence to the defendant that

“the plaintiff should, in this action, be held strictly to the rule allowing a party to recover only according to his allegations and proofs so far as regards the statement of his title to the thing in dispute, as such title is directly at issue.” “The plaintiff could only recover upon proving the case stated in his declaration. (*Williams vs. Morland*, 2 Barn. & Cress., 910; *Bigelow vs. Battle*, 15 Mass. R., 313; *Sumner vs. Tileston*, 7 Pick. R., 198; *Fentima vs. Smith*, 4 East., 107.)”

“When affirmative pleas of justification are put upon the record with the general issue, the plaintiff’s counsel may, if he pleases, not only prove the facts of the declaration, but also may in the first instance, and before the defendant’s case is gone into at all, go into any evidence which tends to destroy the effect of the justification by way of anticipating the defense; or he may, if he pleases, content himself with proving the fact on the general issue, and then close his case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence in reply as to the justifications. But if the plaintiff’s counsel, knowing by the pleas what the defense is to be, close their case and trust to evidence in reply, they are restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant in support of the justifications, and they cannot be allowed to go beyond it.”

2 *Addison on Torts*, 1169.

“It was in the discretion of the Court to admit or reject this evidence.”

Ahrens vs. Adler, 33 Cal., 608.

In *Phelps vs. McGloan*, 42 Cal., 300, the defendant proved that the tenant of her grantor was in possession and paid rent to the landlord, who furnished one Phelps with milk. Plaintiff then called Phelps, who swore

that he was the landlord and received the milk as rent. To rebut this, defendant proved that Phelps agreed to pay cash for the milk. Plaintiff then offered to recall Phelps to deny the agreement to pay cash for the milk. Rejected as not rebuttal. Ruling affirmed on appeal.

“ For the purposes of correct and regular proceeding,
 “ and as far as possible, of placing the claims of parties
 “ upon equal footing in the trial of causes, all Courts
 “ are presumed to have adopted certain rules, applica-
 “ ble to the order in which testimony shall be given.
 “ The rule is, that the party on whom rests the burden
 “ of proving any fact, shall first proceed with evidence
 “ for that purpose, and if no testimony is given tending
 “ to disprove the fact thus attempted to be established,
 “ no farther testimony will be received upon that point.”

Pingry vs. Washburne, 1 Aiken, 264.

If the object of introducing these certificates of purchase was simply to carry back by relation the title already proved in chief by the production of the patents, of course it was not only cumulative, but was inadmissible, as in the teeth of the express allegation of the plaintiff's sworn complaint. If it was not to prove title anterior to the issuance of the patents already in evidence, but was simply to show a prior possessory right to the land, it was equally cumulative, because the evidence offered in chief tending to establish prior, actual or constructive possession on the part of the plaintiffs, was directly upon the same point and offered for exactly the same purpose. But in no sense of the word was it rebuttal of anything proved by the defendants. It did not tend to disprove any one fact or circumstance proved by the defendants, but was simply introductive of a new and collateral fact of the same nature and character, and tending, if admissible at all, only to strengthen the case already attempted to be made in the opening.

We think no case can be found where such testimony

was *rejected* below, that such ruling was held to be error on appeal.

Cases may be found where it has been held not to constitute error for the Court below to exercise its discretion in allowing similar testimony; but none where, having exercised that discretion against allowing plaintiff thus to cumulate the case attempted to be made in his opening, such action has been held to be error; and especially not where, from the very frame-work of the pleading, the nature of the defense was known to the plaintiff beforehand—*a fortiori*, not where the plaintiff not only knew the defense, but anticipated it, and attempted to rebut it before resting his case.

Even if this could be held to have been rebutting testimony, we submit that, if received, the result and decision would have necessarily been the same, because:

1st. The modern English common law doctrine of the rights of riparian proprietors was never the law of California.

The common law on this subject, as it was interpreted and understood in England at the time of the revolution, and at the time of the first emigration to and colonization of America, was, so far as this case is concerned, identical with the California doctrine of prior appropriation as applied to the public lands. In adopting the common law, California must be held to have adopted it as it existed prior to the revolution, and especially cannot be held to have adopted any portion of the common law unsuited to her circumstances, condition and wants.

Osgood vs. The El Dorado Company, and the cases which it follows, and which have followed it, establish the principle that the modern English common law, contended for by appellants here, was not adopted as part of the common law of England in the State of California, and was not suitable to our condition and our wants.

We have nothing to do in this case with the rights of parties claiming under Mexican grants. We deal here solely with the rights acquired as appurtenant to the purchase of public land, either from the State or the General Government.

This Court has decided that, in the absence of any legislation by Congress, all purchases of public land; all patents issued in pursuance of the pre-emption laws—and the principle must be the same as to all patents issued under the swamp land laws—give no rights to water previously appropriated or diverted.

The case of *Broder vs. The Natoma W. & M. Co.*, followed by the Supreme Court of this State in the Osgood case, and by the Supreme Court of Colorado in a case recently decided by that tribunal, establishes the principle that a pre-emption patent to public lands of the United States bordering upon a water-course, gives no right as pertaining to the land patented, to compel the restoration of water previously diverted from that water-course, by one complying with the usages and customs regarding the appropriation of water on the public domain.

From this it follows, that such a patent is not to be construed by the modern English doctrine of riparian rights. So construed, it must be held to pass the right to the water as pertaining to the land, because there could be no prescription against the Government.

The *principle* upon which the contrary is now established must then be, that this modern English common law doctrine was not the law of California, at least in reference to the public lands of the United States within her borders; but that to such lands the doctrine of prior appropriation was applicable. If, prior to the sale of any portion of the public lands by the United States, the doctrine of prior appropriation applied, the same doctrine must apply to State lands prior to any sale on the part of the State; because it became ap-

plicable to the lands of the United States only by reason of its adoption by the State in the first instance.

It follows that if, at any time prior to the obtaining of these certificates of purchase by the plaintiffs or their grantors, the defendants or their grantors had diverted this water, the doctrine of the Osgood case would apply; and if it would apply, it must be solely because as to those lands, the riparian doctrine of the modern English law had been superseded by the old common law, or the new California law of prior appropriation.

Supposing these certificates to have been issued in the year 1872, it follows, according to the theory of the appellants, that from September, 1850, when the Swamp Land Act is said to have vested the title to the swamp lands in California, down to 1872, the principle of prior appropriation was applicable to these swamp lands, which is another way or saying that the State of California, the owner of those lands, and of the waters on those lands, had, during all that period, dedicated them to the public.

Now, in selling those swamp lands the intention of the Legislature was not to revoke this dedication, not to introduce the modern English common law riparian doctrine, not to abrogate the principle of prior appropriation of water, but simply to sell the land and convey it in subordination to that dedication and in accordance with that doctrine of appropriation.

¶ Every reason of public policy existing prior to the sale of the State lands, and preventing the application to them of the modern English doctrine, applies with the same force after the sale of those lands.

The modern English doctrine was just as unsuited to our wants and physical conditions, just as inimical to our ideas of policy and improvement after the sale as before the sale of the land. And it is contrary to all just principles of interpretation to construe the laws authorizing the sale of swamp lands as working a change in the policy of the State in this regard.

In support of these propositions we cite: In *Parker vs. Foote*, 19 Wend., 318. Judge Bronson says:

“It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law.”

Before the adoption of the common law, the Mexican law prevailed, a law always subject to modification by custom and usage, more so even, if possible, than the common law.

Donner vs. Palmer, 31 Cal., 521.

Eseriche Derecho Español, 23-24.

Eseriche Dic. Tit. Costumbse, 1 Feb. Mej., 55 to 61.

Castro vs. Castro, 6 Cal., 160.

Reynolds vs. West, 1 Cal., 326.

Strother vs. Lucas, 12 Peters, 410.

Tevis vs. Pitcher 10 Cal., 477.

Posten vs. Rasette, 5 Cal., 568-9.

Renner vs. The Bank of Col., 9 Wheat., 585.

The common law also was the customary law, the bulk of it judge-made law. “Therefore, in that law,” as Lord Coke says, “the argument from inconvenience very much availed. The benefits of the elements—the light, the air and the water—can only be appropriated by the occupants. If I have a vacant window overlooking my neighbor’s, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall, for there the first occupancy is rather in him than in me. * * * If a stream is unoccupied, I may erect a mill thereon and retain the water; but yet not so as to injure my neighbor’s prior mill or his meadow for he hath, by the first occupancy, acquired a property in the current.”

2 *Blackstone*, 403.

"I think no doctrine better settled than that such
 "portions of the law of England as are not adapted to
 "our condition form no part of the law of this State.
 "This exception includes not only such laws as are in-
 "consistent with the spirit of our institutions, but such
 "as were framed with special reference to the physical
 "condition of a country differing widely from our own.
 "It is contrary to the spirit of the common law itself
 "to apply a rule founded on a particular reason to a
 "case where that reason utterly fails. *Cessante ratione*
 "*legis cessante ipsa lex.*"

20 Wend., 159.

"Rules of law should be adapted not only to the
 "moral but to the physical condition of the country.
 "Had the common law originated on this continent,
 "we should never have heard of the doctrine that fresh
 "water rivers are not navigable above the flow of the
 "tide; nor would our courts of justice have been called
 "upon to compromit the interests of the community
 "by sacrificing truth to technicality, and substance to
 "form."

5 Wend., 463.

This principle has always applied, not only in regard
 to the question of riparian rights, but in all cases where
 it has been contended that the doctrines of the common
 law unsuited to our condition have been adopted by
 the adoption of the common law as the basis of our
 jurisprudence.

Thus the settled doctrine of the common law, always
 was, and is, that there is a right as appurtenant to a
 house, as light and air, that if a man grants a house in
 which there are windows, they cannot be deprived of
 light by building on the adjoining ground not sold.

Allen vs. Taylor, 16 Ch. Revised, 357.

So the common law recognized an easement in favor
 of one tenement and servitude upon and over the other

to enjoy the light and air which naturally reaches the former in coming laterally from and across the land of the adjacent proprietor.

Wash. Easements, 604 (490), (3d. Ed.)

By the common law "one may prescribe for the right of light and air to come to his windows unobstructed across the land of another, if enjoyed for twenty years, or the period of ordinary prescription."

Id. P. 608 (493).

But "the reason for adopting a different rule in this country, as to prescriptive rights to light and air, from that which prevails in England is, that the latter is not suited to the condition of a country which is growing and changing so rapidly in all its relations of property, as well as its value and modes of enjoyment. And in this is witnessed another illustration of the influence of those silent agencies which are constantly at work in a free community, in adopting and giving form and consistency to the rules of its common law, to meet the wants and condition of the body politic."

Ib., P. 612, (498).

In Massachusetts, the doctrine of the common law that the right existed both by prescription and without prescription, if the owner of both house and land sold the house, was upheld, *vide* 12 Mass., 157, but later, in *Keats vs. Hugo*, 115 Mass., 210, the American doctrine was substituted and the common law said not to be adapted to the existing state of things in the United States, and not to be applied in our growing cities and towns without working the most mischievous consequences.

We have made the foregoing quotations, which assume, like the water cases, that the said doctrine as to air and light are those of the common law—not merely the modern interpretation of it; but the analogy holds here also, for "it would be difficult to prove

“that the rule in question was known to the common law
 “previous to the 19th of April, 1775. * * * The
 “doctrine was not sanctioned * * * until 1786
 “* * * 2 Saunders, 175. This was clearly a de-
 “parture from the old law. [*Bury vs. Pope*, Cro. Eliz,
 “118;]” Bronson, J., 19 Wendell, 318.

The case of *Darwin vs. Upton*, 2 Saunders, 175, is an innovation like *Mason vs. Hill*.

So the common law rule in regard to fencing in one's own cattle was *never in force* in California, being repugnant to our customs and to our statutes.

Waters vs. Moss, 12 Cal., 538.

Speaking of the common law rule, that the owner must fence in his own cattle, Judge Trumbull says:

“However well adapted the common law may be to
 “a densely populated country like England, it is surely
 “but ill adapted to a new country like ours. If this
 “common law rule prevails now it must have prevailed
 “from the time of the earliest settlements in the State,
 “and can it be supposed that when the early settlers of
 “this country located upon the borders of our exten-
 “sive prairies, that they brought with them, and
 “adopted as applicable to their condition, a rule of law
 “requiring each one to fence up his cattle; that they
 “designed the millions of fertile acres stretched out
 “before them to go ungrazed, except as each purchased
 “from the Government and was able to enclose his
 “part with a fence? This State is unlike any of the
 “Eastern States in their early settlement, because from
 “the scarcity of timber, it must be many years yet be-
 “fore our extensive prairies can be fenced, and their
 “luxuriant growth, sufficient for thousands of cattle,
 “must be suffered to rot and decay where it grows
 “unless the settlers upon their borders are permitted
 “to turn their cattle upon them. Perhaps there is no
 “principle of the common law so inapplicable to the
 “condition of our country and people as the one which
 “is sought to be enforced now for the first time, * * *

“and we should feel inclined to hold, independent of
 “any statutes upon the subject, on account of the inap-
 “plicability of the common law rule to the condition
 “and circumstances of our people, that it does not and
 “never has prevailed in Illinois.”

Seeley vs. Peters, 10 Ill., 146.

So in *Vicksburg vs. Patton*, 31 Miss., 185, the same view is taken and the common law held not to prevail because inapplicable to the condition of things in Mississippi as differing from that in England and some of the older States, the Court saying: “In a densely
 “populated country like England, with small farms and
 “but few cattle, the reason of this rule that every man
 “shall prevent his cattle from going at large is appar-
 “ent, and the rule prevails because it is suited to the
 “conditions of that country. The same reason may
 “render it applicable in many States of this Union.”

In *Cribbins vs. Markwood*, 13 Gratt., 502, the Court refused to apply the English rule that purchasers from reversioners have the burden of proving the adequacy of the consideration, remarking that the rule, if distinctly settled in England, was not settled at the date of American independence, and (p. 505) that the reasons of policy which influenced the English Courts, have but little application to this country.

S. P.—*Kervacher vs. C. C., etc.*, 3 Ohio St., 183:
 “The doctrine of the common law may be suitable to an
 “old and highly cultivated country where all the lands
 “except the public highways and commons are under
 “inclosure, but it has no suitable and proper applica-
 “tion in Ohio.”

See *People vs. Canal, etc.*, 33 N. Y., 468, for an elaborate presentation of the reasons why the doctrine *ad medium filum* does not apply to large rivers, lakes, etc. in this country, because the common law is inapplicable, etc.

Speaking of riparian rights in rivers navigable in fact but above ebb and flow of tide, and deciding there are none, Yeates, C. J. says the Statute provides that the common law of England shall be in force and binding. "But the uniform idea has ever been, that only such parts of the common law as were applicable to our local situation have been received in this government. The principle is self-evident. The adoption of a different rule would, in the language of Sir Dudley Ryder, resemble the unskillful physician who prescribes the same remedy to every species of disease."

Carson vs. Blazes, 2 Binney, 483.

Flanigan vs. City, 42 Penn. St., 430.

Angell Sec. 549.

"All the King's subjects have a right to the use of flowing water, provided that in using it they do no injury to the rights already vested in another *by the appropriation of the water.*"

Williams vs. Moreland, 2 B. & C., 910; decided A. D., 1824.

"Water flowing in a stream, it is well settled by the law of England, is *publici juris.*"

Liggins vs. Inge, 7 Bingham, 691; decided A. D., 1831.

Angell says, Sec. 130, that the doctrine of *Cary vs. Daniels* (Shaw, C. J.) seems in accordance with that of C. J. Tindal and Sec. 133, that *Mason vs. Hill* settled the law in England. That case was finally decided A. D., 1833-5; Barn. & Adolp., 1.

A similar case to *Cary vs. Daniels* is *Tye vs. Clatching*, 78 Ky., 463-466, holding that the right to the use of a stream can be acquired by occupancy. The right of the second occupant of the stream, for the same purposes, is subordinate to the right of the first, citing Angell Sec. 130.

In *Stockport W. W. Co. vs. Potter*, 3 Hurlst & Coltman, 323, it is said that *Fmbrey vs. Owen*, 6 Exchequer, 353, decided in 1851, and other modern cases, for the first time defined and attributed to the ownership of land, by the side of the running river, these rights in respect to water, these riparian rights.

Take the law of corporations: In England, at common law, they could only contract under seal; and, though the rule has been relaxed in England as to statutory corporations, it still firmly exists as a general rule. But in the United States it is entirely abrogated, and that by judicial decisions.

2 Kent's Commentaries, 288 and following.

So, in England, corporations cannot accept bills unless the power is expressly given or necessarily implied. In America the law is otherwise, and the power asserted without qualification.

Ibid, 290 (Note Twelfth Edition).

In regard to fixtures, at common law the relaxation in favor of the tenant did not extend to erections solely for agricultural purposes; but down to the date of *Eleves vs. Maw*, 3 East's, R. 38, decided in 1802, this common law doctrine, like the riparian doctrine, down to the date of *Mason vs. Hill*, was still disputed by some Judges.

Van Ness vs. Pacard, 2 Peters, 144.

There the Court say:

"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. * * * * Between landlord and tenant it is not so clear that the rigid rule of the common law—at least as it is expounded in 3 *East*,

“38—was so applicable to their situation as to give rise
 “to necessary presumption in its favor. The country
 “was a wilderness, and the universal policy was to
 “procure its cultivation and improvement.”

As to copyright, “no one will contend that the common
 “law, as it existed in England, has ever been in force,
 “in all its provisions, in any State in this Union. It
 “was adopted so far only as its principles were suited
 “to the condition of the colonies; and from this cir-
 “cumstance we see what is common law in one State is
 “not so considered in another. The question respect-
 “ing the literary property of authors was not made a
 “subject of judicial investigation in England until
 “1760; and no decision was given until * * * * 1769.
 “Long before this time the colony of Pennsylvania
 “was settled. What part of the common law did
 “Penn and his associates bring with them from Eng-
 “land. * * * * ”

“Can it be contended that this common law right,
 “so involved in doubt as to divide the most learned
 “jurists of England, at a period * * * * as much dis-
 “tinguished by learning and talents as any other, was
 “brought into the wilds of Pennsylvania by its first ad-
 “venturers? Was it suited to their condition?”

Wheaton & Donaldson vs. Peters, 8 Peters, 660.

“It was the common law we adopted, and not the
 “English decisions.”

Marks vs. Morris, 4 H. & M. Va., 463.

In regard to the common law doctrine, that a parol
 conveyance of land with delivery is good.

“The policy of law and the custom of our country,
 “the danger of perjury and the many inconveniences
 “* * * would in the absence of all legislative pro-
 “vision forbid the adoption of the rule.”

Lessee vs. Coats, 1 Ohio, 245.

In regard to attornment, “it was founded upon a

“state of society which certainly never had any existence in Michigan. The peculiar reasons and relations out of which this doctrine sprang never having had any existence here, why should the rule itself? When the reasons from whence the rule arose cease to exist the rule should cease also. In a country where they never existed a rule should not be adopted. * * * The doctrine of attornment is inconsistent with our laws, customs and institutions.”

Barron vs. L., 34 Mich., 295.

“The opening of the war of the Revolution is the point of time at which the continuous stream of common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments.”

Cooley Const. Limitations, 25, 33

“In the mining States and Territories a peculiar species of common law, relating to mining rights and titles, has sprung up.”

Ibid in Note 1.

In *Hatch vs. Dwight*, A. D. 1821, 17 Mass., 289, “the Court states the law to be: the owner of a mill-site, who first occupies it by erecting a dam and mill, will have the right to water sufficient to work his wheels, if his privilege will afford it, notwithstanding he may by his occupation render useless the privilege of any one above or below him upon the same stream.” * * * This broad doctrine of the effect of the mere priority of occupation has been somewhat criticised by other Courts. * * *

“The subject was deliberately examined by the Court in *Thurber vs. Martin*, 2 Gray, 394, wherein it was held that priority of occupation secures to the

“first occupant the exclusive right to the use of the
“water to the extent of the occupation.”

Washburne, E. & S., 252 and following.

In the Colonies existing before the Revolution the common law adopted, whether by statute or without, meant the common law at the time of their emigration, excluding English statutes passed thereafter, because they had legislatures themselves. As to new States, when they adopt the common law it must be intended the common law as it existed at the time of the Revolution. Neither English statutes nor English decisions after the Revolution form any part of it. And under such a statutory adoption as that of California the portions of the common law as it existed prior to the Revolution, inapplicable to our condition, etc., are not adopted, any more than they were imported by the original Colonies.

Coburn vs. Harvey, 18 Wis., 162.

Spaulding vs. Chicago, 30 Wis., 1-110.

Morgan vs. King, 30 Barb., 12.

The same case in 35 N. Y., 458-9.

As to the inapplicability of the common law, and as to the policy of appropriation as applied to the diversion and appropriation of water after patent to outlet, a strong analogy is found in the decisions subordinating the actual possession for grazing or agriculture to a subsequent mining location, even when the former located before any legislation on the subject.

In *McClintock vs. Bryden et al.*, 5 Cal., 100, it is held that the Statute adopting the rules and customs of miners implies a permission on the part of the miner to enter upon prior possessions held for farming, and that such legislation is retroactive.

“The wants and interests of a country have always
“had their due weight upon Courts in applying principles
“of law which should shape its conditions; and rules
“must be relaxed, the enforcement of which would be

“entirely unsuited to the interests of the people they are
“to govern.”

In the new agricultural States it was the policy to encourage possessions for farming; here it was not. So as to riparian rights. Otherwise “persons without any
“right but that of possession could, under the pretence
“of agriculture, invade the mineral districts of the
“State, and swallow up the entire mineral wealth by
“settlements upon one hundred and sixty acre tracts of
“land. It would be using the law to a very bad purpose if we should allow a person who has no evidence
“of title but his improvements, and no right but that
“of the naked possession he has usurped, to destroy
“for his own benefit the business of a neighborhood,
“and put as well the Government as the mining public
“at defiance. In the decisions we have heretofore made
“we have applied simply the rules of the common
“law. * * * That new conditions and new facts may
“produce the novel application of a rule that has not
“been before applied in like manner, does not make it
“any less the common law. * * * * Every Judge
“is bound to know the history and the leading traits
“which enter into the history of the country where he
“presides. * * * We must therefore know * * *
“that our citizens have gone upon the public lands
“continuously *from a period anterior to the organization*
“*of the State Government.*”

(Therefore anterior to the Swamp Land Act; that is, ever since 1849). “Upon these lands they have constructed ditches, flumes and canals for conducting
“water; built mills for sawing lumber and grinding
“corn; established farms; * * * * *diverted water-*
“*courses.* * * * * The State Government has not
“only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has *studiously encouraged them* in some instances, and recognized them in all. * * * *
“Ever since the organization of the State, among the
“other various enterprises * * * * is that which

“is brought in question in the case before us—the
 “construction of ditches, flumes and canals for the
 “purpose of conducting waters from their natural chan-
 “nels to supply the wants of gold miners.

“In like manner, as in other pursuits, the State Gov-
 “ernment has looked on the progress of these works
 “for the *past seven years*, until their extent has reached
 “hundreds of miles, and every important stream and
 “estate has been tapped by them—has referred to
 “them in various legislative acts, and has annually
 “made them the subject of revenue to the State. In
 “*Irvine vs. Phillips*, * * * and several subse-
 “quent cases, we have recognized their right to
 “appropriate the water, to divert it from its natural
 “channel, where no riparian rights intervene.”

Conger vs. Weaver, 6 Cal., 555.

In *Maeris vs. Bricknell*, 7 Cal., 262, plaintiff in 1851
 cut a ditch from a ravine and through it—actually di-
 verted the waters of the ravine. In 1852 the defendant
 cut another ditch higher up and diverted the water
 from plaintiff’s ditch. The Court below held that
 plaintiff’s intention in constructing his ditch was im-
 material if he was actually diverting the water before
 the defendant’s appropriation, had not abandoned it,
 and that he, plaintiff, would not lose his rights by vary-
 ing the use from the original objects. But the Supreme
 Court held that “possession or actual appropriation
 “must be the test of priority in all claims to the use of
 “water, whenever such claims are not dependent upon
 “the ownership of the land through which the water
 “flows.”

“From this decision, it follows that there must be
 “an *actual appropriation* * * * for some useful
 “purpose allowed by law. In fact, merely turning the
 “water from a claim with the intention to *dispense* with
 “its use, is no actual appropriation at all. It also fol-
 “lows * * * that until such actual appropriation there
 “can exist no complete right to the use of the water,

“for the party may never carry out his intention. * * *
 “If the ditch of plaintiffs was cut for the purpose of
 “drainage, simply, and not for the *bona fide* intention
 “of appropriating the water thus diverted to some use-
 “ful object, and the ditch or ditches of defendants
 “were commenced first in good faith, with the intent
 “thus to appropriate the water, and before any actual
 “appropriation by the plaintiffs or their grantors for
 “mining purposes, then the defendants gained a pri-
 “ority.”

Lord Campbell says, A. D. 1855, that flowing water is not the subject of property. “Blackstone, following
 “other elementary writers, classes water with the ele-
 “ments of light and air: vol. 2, p. 14. * * * For
 “water is a movable, wandering thing, and must of
 “necessity continue common by the law of nature. * * *
 “While it remains in the field where it issues forth,
 “in the absence of any servitude or custom giving a
 “right to others, the owner of the field, and he only,
 “has a right to appropriate it; for no one else can do
 “so without committing a trespass upon the field.”

Race vs. Ward, 4 Ellis & Bl., 708-9.

“The first appropriator of the water of a natural
 “stream has a prior right to such water to the extent of
 “his appropriation.”

Schilling vs. Ronienger, 4 Col., 103.

“Where the climatic conditions are such as exist in
 “Colorado, the right to convey water for irrigating
 “purposes over land owned by another is founded on
 “the imperious laws of nature, with reference to which
 “it must be presumed the Government parts with its
 “title; and although a patent from the Government
 “may be silent in regard to conditions which, if ex-
 “pressly named, would have no greater force, it cannot
 “be asserted that therefore they do not exist. (*Yonker*
 “*vs. Nichols*, 1 Col., 551.) Subject to regulation by
 “statute, and resting upon the law of nature, it is con-

“ceived that the right to convey water over another’s
 “land is inseparable from the enjoyment of the land
 “which the United States conveys to its grantees. This
 “right passes with the estate in the land as a necessary
 “incident.”

Ibid, p 109.

“It is contended by counsel for appellants that the
 “common law principles of riparian proprietorship pre-
 “vailed in Colorado until 1876, and that the doctrine
 “of priority of right to waters by priority of appropri-
 “ation thereof, was first recognized and adopted in the
 “Constitution. But we think the latter doctrine has
 “existed from the date of the earliest appropriations of
 “water within the boundaries of the State. The cli-
 “mate is dry, and the soil when moistened only by the
 “usual rainfall, is arid and unproductive; except in a
 “few favored sections, artificial irrigation for agricul-
 “ture is an absolute necessity. Water in the various
 “streams thus acquires a value unknown in moister
 “climates. Instead of being a mere incident to the
 “soil, it rises, when appropriated, to the dignity of a
 “distinct usufructary estate, or right of property. It
 “has always been the policy of the National, as well as
 “Territorial and State Governments, to encourage the
 “diversion and use of water in this country for agricul-
 “ture; and vast expenditures of time and money have
 “been made in reclaiming and fertilizing by irrigation
 “portions of our unproductive territory. Homes have
 “been built, and permanent improvements made; the
 “soil has been cultivated, and thousands of acres have
 “been rendered immensely valuable, with the under-
 “standing that appropriations of water would be pro-
 “tected. Deny the doctrine of priority or superiority
 “of right by priority of appropriation, and a great part
 “of the value of all this property is at once destroyed.

“The right to water in this country, by priority of
 “appropriation thereof, we think it is, and has always
 “been, the duty of the National and State Governments

“to protect. The right itself, and the obligation to
 “protect it, existed prior to legislation on the subject
 “of irrigation. *It is entitled to protection as well after*
 “*patent to a third party of the land over which the natural*
 “*stream flows, as when such land is a part of the public*
 “*domain, and it is immaterial whether or not it be men-*
 “*tioned in the patent, and expressly excluded from the*
 “*grant.*

“The Act of Congress protecting in patents such
 “right in water appropriated when recognized by local
 “customs and laws, ‘was rather a voluntary recognition
 “‘of a pre-existing right of possession, constituting a
 “‘valid claim to its continued use, than the establish-
 “‘ment of a new one.’ *Broder vs. Nutoma W. & M.*
 “*Co.*, 11 Otto, 274. We conclude, then, that the com-
 “mon law doctrine giving the riparian owner a
 “right to the flow of water in its natural
 “channel upon and over his lands, *even though*
 “*he make no beneficial use thereof, is inapplicable to*
 “*Colorado.* * * * * And we hold that in
 “the absence of express Statutes to the contrary, the
 “first appropriator of water from a natural stream, for
 “a beneficial purpose, has, with the qualifications con-
 “tained in the Constitution, a prior right thereto, to
 “the extent of such appropriation.”

Coffin vs. Left Hand Ditch Co., 11 Pac. Law J.,
 419.

In the case of *Achison vs. Peterson*, 20 Wallace, 507,
 the Supreme Court of the United States say:

“As respects the use of water for mining purposes,
 “the doctrines of the common law declaratory of the
 “rights of riparian owners were, at an early day,
 “after the discovery of gold (‘A. D. 1848’) found to
 “to be inapplicable, or applicable only in a very limi-
 “ted extent to the necessities of miners and inadequate
 “to their protection. * * * This equality of right
 “among all the proprietors on the same stream would
 “have been incompatible with any extended diversion

“ of the water by one proprietor, and its conveyance
 “ for mining purposes to points from which it could not
 “ be restored to the stream. But the Government be-
 “ ing the sole proprietor of all the public lands, wheth-
 “ er bordering on streams or otherwise, there was
 “ no occasion for the application of the common law
 “ doctrine of riparian proprietorship with respect to
 “ the waters of those streams. The Government, by
 “ its silent acquiescence, assented to the general
 “ occupation of the public lands for mining, and to
 “ encourage their free and unlimited use for that pur-
 “ pose reserved such lands as were mineral from sale
 “ and the acquisition of title by settlement. *And he*
 “ *who first connects his own labor with property thus situ-*
 “ *ated and open to general exploration, does, in natural*
 “ *justice, acquire a better right to its use and enjoyment*
 “ *than others who have not given such labor.* So the
 “ miners on the public lands throughout the Pacific
 “ States and Territories, by their customs, usages and
 “ regulations everywhere recognized the inherent justice
 “ of this principle, and the principle itself was at an
 “ early period recognized by legislation”—that means
 by State legislation—“and enforced by the Courts
 “ of those States and Territories.”

In Irwin vs. Phillips, * * * after stating that a
 system of rules had been permitted to grow up with
 respect to mining on the public lands by *the volun-*
tary action and assent of the population, whose free and
 unrestrained occupation of the mineral region had
 been tacitly assented to by the Federal Government,
and heartily encouraged by the expressed legislative policy
of the State, the Court said: * * * “So fully rec-
 “ ognized have become these rights, and without any
 “ specific legislation conferring or confirming them,
 “ they are alluded to and spoken of in various Acts of
 “ the Legislature in the same manner as if they were
 “ rights which had been vested by the most distinct ex-
 “ pression of the will of the law-makers. This doctrine

“of right by prior appropriation was recognized by the
“legislation of Congress in 1866.”

Every word of the foregoing equally applies to appropriations of water on the public lands for agricultural purposes, and outside of the mineral regions.

It is frequently said in the early California decisions that it is not necessary to decide whether these lands belong to the State or to the United States; that that is immaterial, because in every case the proprietor, whether the State or the Government, had assented to this doctrine of prior appropriation.

In the case of *Basey vs. Gallagher*, 20 Wallace, 670, after quoting *Acheson vs. Peterson*, supra, the Court say: “The views there expressed, and the rulings made, are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States or Territories by the customs of miners or settlers, or by the Courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one.”

In *McDonald vs. Bear River Co.*, 13 Cal., 232, the Court say: “The ownership of water as a substantive and valuable property, distinct sometimes from the land through which it flows, has been recognized by our Courts. * * * The right accrues from appropriation. This appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use. We have held that there is no difference in respect to the use, or rather purpose, to which the water is to be applied; at least, that an appropriation for the uses of a mill stands on the same footing as an appropriation for the use of the mines. * * * If by the erection of a mill and the possessory right of land on the stream the water be acquired—this being evidence of the appropriation of the water—the right would pass, etc. It seems to have been further held that though the appro-

priator, *for other than mining purposes*, took possession of a portion of the bed and banks of a stream and erected a grist-mill, and thereby appropriated water for the use of the mill, he could not claim as riparian proprietor all the water of the stream, but only as much as he needed for his mill, and that "if there was an excess of water for this purpose, any other locator or proprietor is entitled to have it."

Ortman vs. Dixon, 13 Cal., 38, was the case of a ditch taking water for a saw-mill. P. C.—"We presume that it is not to be doubted that the defendants, having first appropriated the water for their mill purposes, are entitled to it to the extent appropriated, and for those purposes, to the exclusion of any subsequent appropriation of it for the same or any other use. We hold the absolute property in such cases to pass by appropriation, as it would pass by grant. * * * If, for instance, a man *takes up water to irrigate his meadow* at certain seasons, the act of appropriation * * * would qualify his right of appropriation to a taking for a specific purpose, and limit the quantity to that purpose, or to *so much as necessary for it*. So, if *A* erects a mill on a running stream, this shows an appropriation of the water for the mill; but if he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, we do not see why persons below may not as well appropriate this residuum. * * * The principle is not materially different when applied to the fact that the ditch of defendant was built above plaintiff's mill, and the water diverted so as to be carried out of the old channel or course; for, upon the ground suggested, plaintiff was only entitled to the water for the purposes of the mill. He was entitled to all, when all was necessary for the mill; but whenever the mill did not need or could not use it for its operations, the defendant could use it for his purposes. * * * It is not a question of priority as to

“two classes of appropriators, for we cannot draw any distinction between the mill-owner and the miner.”

It seems that in *McDonald vs. Bear River*, 13 Cal., 232, the prior appropriator of the water not only constructed a grist mill upon the stream, but located 160 acres of land, embracing the water course.

So in *McKinney vs. Smith*, 21 Cal., 381, which followed *Ortman vs. Dixon*, it was held that the possession of the bed of the stream by miners only gives the right to the water actually appropriated, *e. g.*, necessary for the working of their claims, and that others may divert the residuum.

In *Smith vs. O'Hara*, 43 Cal., 374, the ditch was dug in 1851, *not* for mining purposes, but it seems to irrigate a vineyard, etc. The Court say: “It is not to be doubted that the person who first appropriates for mining or other purposes the waters of a stream running upon the public lands is entitled to the same.”

In *N. C. & S. C. Co. vs. Kidd*, 37 Cal., 314, Sawyer, J., says: “In *Weaver vs. Eureka Lake Water Co.* it was also held that a claim” [to water] “for mere speculative purposes * * * would give them no right against subsequent appropriations. The doctrine is that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others. * * * Canals for mining and other purposes often run side by side, even crossing and recrossing each other. * * * A party's right is limited to the general object for which it is acquired, and another party may acquire another right for similar or other objects not in conflict with the prior right.”

"Too strict an application has been made of the rules
 "of the *old* common law * * * to the acquisition
 "and protection of water rights in the mineral regions
 "of this State. Those rights are to a considerable de-
 "gree *sui generis*. They are in a great measure the
 "growth of this State, and are founded upon condi-
 "tions which are in many respects strange to the old
 "common law. Too close an application of the rules
 "of the common law in vogue under different circum-
 "stances leads to mischief rather than a just settlement
 "of legal controversies. Such rules must be modified
 "to meet the exigencies of the changing pursuits of the
 "people; or, in other words, a loose rein should be
 "given to the spirit of the common law, that it may
 "adapt itself to the new conditions and relations with
 "which it has been called upon to deal in this State.
 " * * * The greatest beauty and crowning glory
 "of the common law is its adaptability to new con-
 "ditions."

Rupley vs. Welch, 23 Cal., 455, is also a clear Califor-
 nia *State* authority that by the State laws, State action
 and State decision the doctrine of appropriation, and
 not *that part* of the English doctrine of riparian rights
 which forbids the diversion of a running stream to dis-
 tant points by other than riparian proprietors, is, and
 ever was, the law of California, and does apply equally
 to appropriations for agricultural purposes, irrigation
 of gardens, fields and trees, etc., as to appropriations
 for mining purposes; and fully sustains the statement
 of Judge Field, that *that part* of the modern English law
 is, and ever was, *inapplicable* in California, so far as the
 public domain is concerned.

So in *Butte vs. Vaughn*, 11 Cal., 153, Judge Field
 says: "The first appropriators of the water of a stream
 "passing through the public lands in this State has the
 "right to insist that the water shall be subject to his
 "use and enjoyment *to the extent of his original appro-*
 "*priation*, and that its quantity shall not be impaired so

“as to defeat the purpose of its appropriation. To this extent his rights go, and no further.” And finally, in the Osgood case, this Court say: “The principle of prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining, and other like purposes, is absolutely essential, which has all along been recognized and sanctioned by the Supreme Court of the United States,” etc.

In *Broder vs. Natoma Company*, 11 Otto, 274, the point involved was that the Central Pacific Railroad Company claimed a grant from the Government of a date anterior to the passage of the law of 1866, the party claiming water claimed by an appropriation which was prior to this alleged grant to the railroad from the Government; and the question of course necessarily was raised which was raised in *Van Syckle* against *Haynes*, the railroad company saying the Government had never given any title to this land before, and that no Statute of Limitations could run against it; that the railroad company became just what the Government was at the time of the first appropriation, and therefore were entitled to the water. As to the law of 1866, the company said:

“You cannot rely upon that Act, because our rights had vested by transmission of the title before the law of 1866 was passed, and Congress was powerless to divest or take away by any act of subsequent legislation the rights already vested in us.”

The Court held that the case must stand exactly as if the law of 1866 had never been passed, and the result is that the man who first takes the water is entitled to it as against the man who afterwards gets from the Government the dry bed from which the stream was diverted. And this upon the express principle that the State had substituted appropriation for riparian rights, So that legislation by the State, or tacit acquiescence of the State, operates in favor of the prior appropriator of the Calloway just as the tacit acquiescence of Congress

operated when the question was as to the land of the General Government.

Judge Miller said: "It is the established doctrine of this Court that rights of miners who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches, to be used in mining operations and for purposes of agricultural irrigation in the region *where such artificial use of the water was an absolute necessity*, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866." And in *Jennison vs. Kirk*, 98 U. S., 458, they say: "The doctrines of the common law respecting the rights of riparian owners were not considered as applicable. * * * The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through cañons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes and the protection of rights to water, not only between different appropriations, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State Court, and received their sanction. * * * And properties to the value of many millions rested upon them. For eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and molded by the Courts and sanctioned by the legislation of the State, constituted the law governing properties in mines and in water on the public mineral lands. * * * The Legislature of California had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims,

“and when not in conflict with the constitution or laws
 “of the State, or of the United States, should govern
 “their determinations; and a series of wise judicial
 “decisions had moulded these regulations and customs
 “into a comprehensive system of common law, embracing
 “not only mining law, properly speaking, but also regulat-
 “ing the use of water for mining purposes.”

It follows from the foregoing that by the action, acquiescence and legislation of both the State and National Governments, the waters on the public lands have been dedicated to the uses of appropriators from a period ante-dating the organization of California.

Gillan vs. Philadelphia, 3 Wall., 721.

Regina vs. Eastmark, 11 Ad. & Ellis, New Series, 1882.

Shaw vs. Crawford, 10 Johns., 237.

1 Bouvier Law Dict., 443.

Cincinnati vs. White, 6 Peters, 437.

Washburne on Easements, 137-138.

Hermann vs. Beef Slough Co. is especially in point, applying in favor of the lumber and logging interests of Wisconsin, the same principles which we seek here to apply in favor of irrigating desert lands, and upon the same principles. The Court say:

“In the light of these precedents and statutory
 “authorities in connection with an extensive and unin-
 “terrupted usage coeval with the existence of the State,
 “we do not hesitate to hold that the use of the Chip-
 “pewa River by the public as a highway for the trans-
 “portation of logs and lumber is a right common
 “to all, recognized and protected by the municipal
 “law, and that such right must continue so long as the
 “public have any need of its exercise, unless changed
 “or abrogated by the legislature of the State, or by
 “Congress. And there is no reason why it should not
 “be so.”

A stronger analogy is afforded by the course of decision in regard to the admiralty jurisdiction of the

United States. At first, adhering technically to the common law definition of navigable rivers, and applying the criterion of the ebb and flow of the tide, the only one known to the common law, the Courts held that the grant of jurisdiction could not be construed to extend to the great fresh water rivers and lakes of this country where the tide did not ebb and flow.

In a late opinion of the Supreme Court of the United States, Judge Bradley said that an attempt to comply with a technical rule without reference to the reason of the rule or its origin, sufficed to prevent the attaching of the admiralty jurisdiction of the Federal Courts over such rivers as the Mississippi above where the tide ebbed and flowed for a quarter of a century. But afterwards more comprehensive views obtained, and upon the principle that the common law to that extent was here inapplicable, and the reason of the rule having ceased, a different rule was adopted and now obtains.

We have then two opposing views on this subject: one, that we adopted the common law; that by the common law the owner of land bordering on or enclosing a water-course, as riparian proprietor is entitled as of right to the flow of the water uninterrupted and undiminished, regardless of his desire or capacity to put the same to any beneficial use whatever. That this right to the water, by reason of the technical rule of the common law thus construed, to be adopted in all its rigor, is, strictly speaking, appurtenant to the land, is annexed to the land, is an incident to the ownership of the land, belongs as much to and is as inseparable from the land as the trees growing upon or the stones resting on it.

On the other hand, we have a view so sustained by authority, that to this extent the common law was not adopted because inapplicable to the public lands of California; that in its place the doctrine of prior appropriation to beneficial uses prevailed; and that all grants and patents must be construed in accordance with this universally recognized principle, and by the laws,

usages and customs existing at the time of the grant in relation to the subject matter of the grant.

This principle was applied by the Supreme Court of the United States in the case of *Heydenfeldt vs. Danej Company*, 3 Otto, 637. In that case, the Statute to be construed read as follows: "That Sections 16 and 36 "in every township, and where such Sections have been "sold or otherwise disposed of by an Act of Congress, "other lands equivalent thereto, in legal subdivisions "of not less than one-quarter section, and as contiguous "as may be, shall be and are hereby granted to said "State for the support of common schools."

According to the letter of this Statute, there was a grant *in presenti* which would override any subsequent sale or disposition by Congress. But construing the Statute in the light of the surrounding circumstances, the history and customs of the locality, and the local laws and wants, it was held that though literally construed the words of the grant referred to past transactions, evidently they were not employed in that sense; but until the status of the lands was fixed by the survey and they were capable of identification, Congress preserved absolute power over them.

See to the same point:

Wedekind vs. Craig, 56 Cal., 646.

Ivanhoe Co. vs. Keystone Co., 1 Morrison's Transcripts, 134.

The case of *Atherton vs. Fowler* establishes the same principle, the pre-emption patent being construed with reference to the history and condition of the country and the policy of the Government, in the light of which policy language otherwise bearing that interpretation was held not to include land already in the possession of another.

Applying this principle of construction, it cannot be held that either the General Government, in granting the swamp lands to the State, or the State in granting these lands to purchasers, intended to pass as appur-

tenant to them the modern English riparian rights. The fair and reasonable presumption is that it was intended to pass the land alone, and leave the water subject to the general doctrine of appropriation adopted in preference to that of riparian right for wise and permanent public purposes and reasons. Because if it was wise in the first place to reject the modern English doctrine of riparian right, it was equally wise not again to restore that doctrine upon the alienation of the public domain. The policy inaugurated was not a temporary one, but a permanent and enduring policy. The reasons for its adoption in the first place applied in favor of its retention afterwards; and the mere fact of the sale of the land furnishes no reason why, after the sale, a different doctrine in regard to riparian rights should obtain than obtained before the sale. Especially is this so in regard to lands like those in question, which were granted by the General Government because the water upon them was a nuisance in its then condition, and were granted upon the express condition that this water should be removed by the State in the reclamation of the land.

“By accepting the grant, the State assumed the duty
“and obligation of draining the land acquired by it.”

State vs. Milk., 13 Reporter, 709.

It is not to be presumed that in passing laws for the disposition of this land, and intending to drain them, a principle was adopted which, as appurtenant to the land, should give to the purchaser the right to the unobstructed, undiverted and undiminished flow of the very water which it was his duty to take away.

If the law of 1866—though its letter only protects appropriations already made and vested—has been properly construed, in so many decisions to protect prior appropriations thereunder, as against subsequent patents, so for the same reason the swamp land grant, and the State laws passed thereunder, should be construed, not to displace or affect the prin-

ciple, the doctrine of prior appropriation, or to work a change in the law of the State upon that subject. Especially should not these laws and grants be construed to give any vested right as against appropriations made before the issuance of the patent by the State to parties holding a mere certificate of purchase; to parties who not only have made no appropriation of the water, but who may never even carry out their intention to acquire the land by making final payment and obtaining the patent. At the very least, while the title remains in the State until the purchase has been fully consummated and the right to the patent vested, the water should remain subject to appropriation under the laws of the State, as of other public and unclaimed lands.

Before any rights were acquired from the State, the law of the State was that "*the legislation of the State has given to every one not only a privilege to work the gold placers, but also to divert the streams for this and other purposes. The legislation of the State has been held to amount to a general license to all.*"

Hill vs. King, 8 Cal., 338.

The principle and reason of the whole, as set forth in the Osgood and similar cases, is this, that the owner of land through which flows a water-course while he owns it all, both the dominant and servient tenements, as the books phrase it, has the right, as owner, and nobody else being interested, at his will and pleasure to dispose of and alter and change the relative relations of the different parts of land, one to the other. If I own all the land from the source to the outlet of a given water-course, and on both sides of it, all the way down, I can as long as it belongs to me, and I alone have any interest in it, I can divert a portion of the whole of it away from the channel and carry it anywhere I please. I can take a part to this house—use a part on that park; I can take a part to this mill; I can take the rest in a different direction, and nobody can complain, because of course nobody else has any interest to be affected.

Now, then, if after having done that; if after having thus fixed these qualities and relationships upon the land, I sell one parcel, or several parcels, my grantees take, subject to all that I have done; and if I have already taken part of the water out in one direction, the grantee of the old dry bed that I have left cannot complain and say that either I or my grantee must put it back there again.

The law on this subject is thus expressed:

"The owner of real estate has, during his ownership, entire dominion and control over its various natural qualities, and may dispose of and arrange them at will. He may alter the natural distribution of those qualities so as essentially to change the relative value of the different parts. * * * The principle is, that when the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains."

So, the Government of the United States, being the owner of all this land, had the right to do just as it pleased with the land, and the mines, and the ores, and the water, and every constituent making up the sum total of the public domain. Having the right to do what they pleased with it, what did they do as shown by the history of the country and by the decisions of the Courts? They adopted that doctrine above quoted from Blackstone. They repudiated this modern doctrine of riparian rights. They said, there has grown up in California a different principle, and we adopt that principle as the law of the public lands.

In other words, the law of 1866, being construed as the Supreme Court of the United States has construed it, merely as a recognition of what already existed, and not as the creation of any new principle or right, must be interpreted just as it would have been interpreted if it had said, with a preamble:

“Whereas, on the public land of this Government, in
 “the State of California a condition of climate exists
 “which renders it impossible to apply the English doc-
 “trines of riparian law; and whereas, in consequence
 “of the physical condition of that country, a customary
 “law, a California law, has been allowed to grow up,
 “which repudiates the doctrine of riparian rights—
 “which has replaced it with the doctrine of prior ap-
 “propriation; and whereas, in California, the artificial
 “use of water for mining and irrigation is an *absolute*
 “*necessity*, and the equality of right recognized by the
 “later common law authorities, is incompatible with
 “any extended diversion of the water; and whereas, in
 “natural justice the actual appropriator has the better
 “right; *therefore*, be it enacted, that vested and accrued
 “rights to the use of water, recognized by custom and
 “decision in the State and by the State, shall be pro-
 “tected.”

No one would deny that such a statute would have
 been equivalent to one expressly abrogating and deny-
 ing all riparian rights, inconsistent with the doctrine of
 appropriation; and that therefore the pre-emption and
 other land laws must be construed in *pari materia* with
 such statute, and that a pre-emption would take by his
 patent, subject to all future appropriations. Such a
 denial would be a negation of the acknowledged right
 of the proprietor of both the dominant and servient
 tenements, before severance to destroy all easements
 and relations between them at his will and pleasure.
 But, substantially, the law of 1866 is the same as the
 statute with the preamble above supposed—for the
 former *implies* all the latter *expresses*.

If the statute has said that in so many words, as a
 necessary result, no party who had purchased from the
 Government at any time after this custom grew up,
 that is to say, any time after the settlement of Califor-
 nia, could ever be heard to complain, or to set up a
 complaint or claim founded on riparian right, any more
 than the man who has purchased one parcel from the

proprietor who owned the whole water-course and had diverted a part of it, could come along and complain, and say that it must be brought back on to this land, although he had bought it after the owner had destroyed the riparian relationship between one tenement and the other.

Now, then, this Act of the Congress of the United States, this working out of this result, and this chrystalizing and perpetuating and making permanent this customary law, this abrogating of this riparian law, was worked, how? Not by the direct act of the Federal Government, except merely in its recognition and approval of what others had and have done. The Federal Government, as a Government and as proprietor of this land, did not itself inaugurate this system, did not itself abrogate this riparian law of England, so alien and destructive in this country. But it found that the State of California, as a State, as a people, had done this thing, because they were forced to do it, and the Government of the United States simply sanctioned, and approved and adopted what the State of California as a State and as a people had done.

Now, then, it does not follow absolutely, mathematically, to a demonstration, that if because of this recognition of the State doctrine and the State abrogation of riparian rights, by the General Government, those riparian rules were no longer applicable to the Federal domain, and as between the successive grantees of the Federal domain, that *a fortiori* those doctrines of riparian rights could no longer be applicable as between the successive grantees of the State to State lands, thus, in the first place, and before the action of the Federal Government, and equally, and for the same reasons of policy and necessity, and right, and for the same purposes affected by the principle of appropriation to the exclusion and abrogation of the principle of riparian law which it superseded and abrogated. That amounts to a demonstration that if, by this sanction and acquiescence and subsequent approval by the Federal Govern-

ment, the riparian law ceased to be the law of the Federal public land, *a fortiori* by the sanction and by the action, by the affirmative action of the State, by the inauguration of this system on the part of the State, before being sanctioned by Congress, that same result followed as to the State lands; and must work the same result as between the prior appropriators of water flowing over the State lands, and subsequent State purchasers of those lands thus affected by this prior appropriation. And a further result follows, that when you come to interpret a patent from the General Government, or a patent from the State of California, for Government lands or State lands, as the case may be, in either case you must construe the patent, not by the common law which the grantors of that land had before repudiated and cast off and condemned; but by the law of prior appropriation which that grantor had sanctioned and affixed to the land, before the making of that patent. When you construe the deed of the Government you construe it in the light of the existence of the wise and just principle of prior appropriation, and not by the principle of riparian right. When you construe the patent of the State, and seek to find out what the State has granted by that piece of paper, you construe it not in the light of exploded and rejected principles of common law, but in the light of the living principle of prior appropriation, by the proper authority, by the owner of that very land, affixed to that land before giving it away.

B.

The finding against the prior possession of plaintiff is well sustained by the evidence and by the law.

It was attempted to be proved upon the principle of *Hicks vs. Coleman*, 24 Cal., that the party entering in good faith under a deed describing the premises by metes and bounds, taking actual possession of a part is

deemed in law to have constructive possession of the whole.

The doctrine of that case has been changed, qualified and restricted by later decisions.

See *Wolfskill vs. Malajowich*, 39 Cal., and the cases there cited.

The only act of possession attempted to be proved was that there was pumping done on the ground in 1871, and as to that there was a conflict of testimony. The land was divided up into segregated subdivisions, and by the law and the statute possession of one part was not possession of any other part. But there was no possession of any portion. The utmost the proof tended to establish was that the plaintiffs ranged their cattle over the land, as every one else did. Mr. Gibbes, when first on the stand, gave evidence which might have been construed to mean that the deed described the lands by specific metes and bounds, by its reference to the United States plats of record. But upon being called for the defendant, he testified that the maps which he introduced in evidence were not copied from anything which appeared of record in the Land Department or in the United States surveys, and could not have so appeared, because it was not among the originals on file in the Department. Therefore, on their own proof, there is no tract of land described by the deed introduced. The deed calls for the sections as designated by the plats on file and in the Land Department, and refers to those plats on file; but the proof shows that there is no such land in existence, thus bringing it within the case of *Hess vs. Winder*, in 30 Cal.

But if ever they had possession of the land, that possession would not, under the laws of California, give them the right to any more of the water than they appropriated and put to beneficial uses.

C

The case of the plaintiff fails even on the application of the modern common law doctrine of riparian rights, because as a matter of fact, and as found by the Court, there was here no water course.

We have referred elsewhere to the testimony tending to sustain the finding upon this point, and as to the law we cite the following authorities:

The proposition whether this was a water-course extending through plaintiffs' lands, and whether they were riparian proprietors upon that water-course, is a question of fact to be decided by the jury or the Court; and upon the application of settled principles to the testimony in this case that question of fact was correctly decided.

In the case of *Eulrich vs. Richter*, 37 Wis., 228, the Court say:

"We think the learned Circuit Court erred in charging, as a proposition of law, that the *locus in quo* was a "natural water-course." It seems that in that case the Court below told the jury that it was a water-course, without referring it to the jury as a question of fact.

"The jury were told that there was no substantial "conflict in the testimony with regard to the character "of the streams, and that as a matter of law it was a "water-course which the defendant had obstructed. The "definition of a water-course, as given by Mr. Angell, "and which has been substantially adapted by this Court, "is a stream of water consisting of a bed, banks and "water, though the water need not flow continually "and there are many water-courses which are some- "times dry. There is, however, a distinction in law "between a regular flowing stream of water, which, at "certain seasons, is dried up, and those occasional "bursts of water which, in times of freshet, or the melt- "ing of snow and ice, descend from the hills and unin-

“date the country. To maintain the character of a water-course, it must appear that the water usually flows in in a certain direction, and by a regular channel, with banks or sides. It need not be shown that the water flows continually; the stream may at times be dry, but it must have a well-defined and substantial existence.

Angell on Water Courses, § 4 and other cases.

“According to our understanding of the testimony, there is considerable doubt whether it proves a water-course, within this definition, or whether it did not appear that the water was mere surface water, descending from higher to lower ground in no defined channel in times of rain, or the melting of snow and ice in the spring. If it was mere surface water caused by rain or snow, which naturally flowed down the hollow or ravine, but in no defined channel having a bed and banks, then it was not a water-course, and the defendant had the right to use such means as she might deem necessary to keep it off her land. * * *

“There was testimony which tended to show that the flow of water down the hollow or ravine from the plaintiff's to the defendant's land was not in any regular channel, that it was only occasional, and did not prevent the cultivation of the ravine, or the growing of grass there. The plaintiff's land was rolling, and considerably higher than the defendant's, and of course all surface water caused by rains or the melting of snow was discharged from the higher through the lower ground. But there was testimony from which the jury might have found that the flow of water did not constitute a water-course within the sense of the law; that it had no well defined channel, with bed and banks, *which extended from the land of the plaintiff upon and across the land of the defendant.*”

See *Bowlsby vs. Spier*, 2 Vroom. (N. J.), 352.

See also *Swett vs. Cutts*, 50 N. H., 439: The Court

say: "This doctrine appears to embrace that large class
 "of cases where the water flows in sight upon the surface
 "in wet seasons of the year, but not to such an extent as to
 "mark a regular channel with banks and sides; and also
 "where the water moves slowly but obviously through boggy
 "or swampy lands, constituting the sources of streams and
 "rivers."

See also—

Goodall vs. Tuttle, 20 N. Y., 461.

Buffano vs. Harris, 5 R. I., 253.

Broadbent vs. Ramsbottom, 11 Exch., 602.

Shields vs. Arnott, 3 Gr. Ch., 246.

Dixon vs. The City, 7 Allen, 21.

Wagner vs. Long Island, 5 Thompson & Co. N. Y., 163.

S. C. 2 Hun., 635.

Conhocton vs. Buffalo, 5 Thomp. & Co. N. Y., 651.

S. C. 3 Hun., 523.

Delhi vs. Youmans, 45 N. Y., 363.

Curtis vs. Ayrault, 47 N. Y., 77.

To constitute a water-course, it must be in character permanent and constant in usual and ordinary seasons. But if a marsh or swamp is made by water oozing from the surrounding hills, generally wholly absorbed by the marsh, and only flowing from the basin or marsh in times of excessive rains or of melting snows, the party owning the marsh may divert it.

Boyrton vs. Gilman, 53 Vt., 19.

Again, the finding and evidence show that Buena Vista and Kern Lakes constituted the terminus of the water-course; that in its natural flow the water would first all go into the lake, and only that would reach the swamp which in unusual times overflowed the borders or rim of the lake. We submit that to such a case the doctrine of the common law can have no application. So far as standing water, that has no current, standing

on the land is concerned, it belongs to the owner of the land, and he can divert it in the same manner as he can divert any other surface water.

State vs. Pattermeyer, 33 Ind., 402.

Cummings vs. Bassett, 10 Cush., 189.

Stevens vs. Patterson, 34 N. J. Law, 543.

Gould vs. Hudson, 6 N. Y., 522.

Thomlin vs. Dubuque, 32 Iowa, 106.

State vs. Milk, 13 Reporter, 709.

We had the right either to raise the outlet of the lake or to divert the water before it got into the lake, because when diverted it would be flowing in no regularly defined current and channel.

We had as much right to divert the water of Buena Vista and Kern Lakes before overflowing as we would have to cut ice from the lake, and for the same reasons.

Washington Ice Co. vs. Shortall, 13 Reporter, 9, and cases cited.

A mere remote contingent possibility, or even probability, that the water standing still, without current, in the lake might at some time trickle over and flow into the swamp, does not give to the proprietors in the swamp the common law riparian right. That is not the direct natural connection which is required by the common law to connect the dominant with the servient tenement, to maintain the claim for a diversion, at the suit of a riparian owner. That law intends the usual flow, the full flow, the uninterrupted flow, and the necessary flow; not a contingent, possible flow.

It is only upon the proposition that plaintiffs connect a running stream from their land to the point of the alleged diversion that they can have any right as a riparian proprietor. And here the standing and pooling of the water in the lakes breaks that connection.

In regard to the surplus waters which only come down in times of snow and overflow of the lake, the language of Judge Shaw, in *Cummings vs. C.*, 10 Cush-

ing, is applicable, and, besides, such a claim is too remote.

See *Elliott vs. Pittsburg*, 10 Cush., 195.

Another reason why the doctrine of riparian rights is not applicable, whether the plaintiffs claim by virtue of their patents, or of the prior possession, or of their certificates of purchase, even conceding the existence of a water-course, grows out of the situation of the land and the water in the swamp, even upon their own showing.

A glance at the map the Court will see, especially so far as the land embraced in the certificates of purchase is concerned, and clearly in regard to the other evidences of title also, the lands claimed by the plaintiff do not lie in any connected body entitling them to claim their asserted water-course upon the common law doctrine of extending *ad medium filum*.

The land for which the certificates of purchase were issued to plaintiffs are platted and granted without any reference to the course of the stream. And the manner in which the stream meanders through the several parcels, and the situation of these parcels with reference to the stream, exclude the application of the doctrine of riparian rights.

On this point the case of *Hoehl vs. The City*, 57 Iowa, 454, is in point. The Court there say: "The stream
"in question meanders through the city of Mosqueton;
"* * it is not made the general boundary of property
"situated upon its sides, but the town plat is laid out
"without any reference to it. In some places lots extend far into the stream; in others they are situated
"almost wholly within it; and in other places the bed
"of the stream occupies almost the entire width of the
"street. It is evident that no lot owner bordering
"upon the edge of the stream could have a qualified
"property in the soil; for each lot would always be
"bounded by another lot or by the edge of the street.

"It seems that the doctrine of riparian proprietorship cannot be applicable to property thus situated.."

To the same effect is the language of the Court in the case of *The State vs. Milk., supra*:

"Non-navigable streams are usually narrow; and the lines of riparian proprietors can be extended into them at right angles without interference or confusion, and without serious injury to any one. It was therefore natural, when such streams were called for as boundaries, to hold that the real line between opposite shore owners was the thread of the current; * * but when this rule is attempted to be applied to lakes or ponds, practical difficulties are encountered. *They have no current.* I do not think the mere proprietorship of the surrounding lands will in all cases give ownership to the beds of natural, non-navigable lakes and ponds, regardless of their size."

D

The claim of the plaintiff is that, although they have sustained no injury, and could prove none, and although they have dismissed their claim for damages, yet, upon the assumption that defendants are mere trespassers, and not riparian proprietors, it was not necessary for them to prove any actual damage, and we are not entitled to take even a reasonable quantity of the water of the stream.

But we contend that in this case we stand in the attitude of supra-riparian proprietors, and had, in any event, the right to divert and use a reasonable quantity of water.

"The reasonableness of the use depends upon the nature and size of the stream, the business or purposes to which it is made subservient, and on the ever-varying circumstances of each particular case. Each case must therefore stand upon its own facts, and can be a guide in other cases only as it may illustrate the ap-

“plication of general principles. It has been well said
 “that in determining upon the reasonableness of the
 “use, it is necessary to take into account not only the
 “general customs of the country, *but also any local*
 “*customs along the streams*, and that such general rule
 “should be laid down as appears best calculated to se-
 “cure the entire water of the stream to useful pur-
 “poses.”

Cooley on Torts., pp. 483-584, and cases cited.

“What constitutes a reasonable use is not a question
 “of law, but of fact. * * * Regard must be had to
 “the subject matter of the use; the occasion and man-
 “ner of its application; the object, *extent, necessity*, and
 “duration of the use; the nature and size of the stream;
 “the kind of business to which it is subservient; *the*
 “*importance and necessity of the use claimed by one party,*
 “*and the extent of the injury to the other party* * * *
 “and all the other and ever varying circumstances of
 “each particular case.”

Red River vs. Wright, Northwestern Reporter,
 March 24, 1883, Vol. 15, p. 169.

There must also be considered “the uses to which
 “it can be or is applied. * * * *the rule is flexible*
 “*and suited to the growing and changing wants of com-*
 “*munities.*”

Harris vs. Baldwin, 44 N. H., 584.

City vs. Harris, 4 Allen, 495.

In this State the right to use water for irrigation
 stands on the same high plane that in England and
 some other States the right for domestic purposes
 stands, and the more recent cases affirm that “a ripa-
 “rian owner has the right to use water for such pur-
 “poses, *even if that use consumes all of the water during*
 “*the dry season when the water is very low.*”

Slack vs. Marsh, 11 Phila. R., 543.

“To limit a land-owner to the mere benefit of having a stream flow through his land, without any right to divert the same or any part of it, would be defeating, in a great measure, the purposes for which Providence had supplied these sources of comfort and convenience to man, and the means of fertilizing the soil and giving a profitable employment for industry and art; it is accordingly held, that if, in any question of diversion, the jury should find it was only of such water as the complaining party could not have used for any beneficial purpose, or that it was made in a reasonable manner, and for a proper purpose, an action for the same would not lie.”

Washburn on Easements, § 230.

See also:

Gould vs. Boston, 13 Gray, 442.

Haskins vs. Haskins, 9 Gray, 390.

Tourtellot vs. Phelps, 4 Gray, 370-6.

Thurber vs. Martin, 2 Gray, 394.

Pitts vs. Lancaster Mills, 13 Metc., 156.

Wadsworth vs. Tillotson, 15 Conn., 366.

Springfield vs. Harris, 4 Allen, 494.

Snow vs. Parsons, 29 Ot., 462.

That we are riparian proprietors is evident from the fact that if there was any water-course from Buena Vista Lake to Tulare Lake, the banks and boundaries of that water-course were the boundaries of the whole swamp. And from this two things follow: first, that all riparian rights in the waters of this stream, from the Rio Bravo Ranch in the Sierra Nevada Mountains down to Tulare Lake, were in the Government of the United States as the owner of this whole bank of the water-course, and in its grantees acting under this license in diverting and appropriating the water; and, further, that even conceding all that is claimed by the plaintiffs, and even admitting their title to date from their certificates of purchase, they would not be riparian proprietors, because it is well settled law that

“The mere ownership of the soil over which water flows gives no special or beneficial interest in the water. It is rather the ownership of the banks on either side of the stream that creates and upholds the right.”

Woods on Nuisances, p. 316, § 345.

The fact that under the license and legislation of Congress we were taking water from the stream, and had possession of its bed and banks for that purpose, constituted us riparian proprietors.

Earl of Sandwich vs. Great Northern, Law Reports, 10 Chan., Div. 707.

In *Hill vs. King*, 8 Cal., 338, it is said: “Some of the later English authorities held that a right to water might be acquired by the riparian proprietor by appropriation; and this Court might with propriety have maintained the rights of water companies on the ground that they were riparian owners.”

See also *Elliott vs. Pittsburg*, 10 Cushing, 195, and—

Mayor vs. The Commissioners, 7 Barr. Pa., 348.

Even if the plaintiffs could maintain their claim as riparian proprietors on the small depression which they claim to exist through the swamp, and call the slough, their rights as such would be bounded by the limits of each segregated parcel or section purchased by them from the State. If, by afterwards purchasing other lands in separate and segregated divisions from the State, they can extend their riparian rights over the whole tract, *a fortiori*, we, as grantees of the Government, would be considered as riparian proprietors above as to all the Government lands which we were authorized by the laws of Congress to irrigate.

E

The testimony shows that in the year 1875, at the first inception of the Calloway, the plaintiffs knew how much water it was going to take.

Mr. Crocker testified that he talked with Mr. Miller and Mr. Lux about it. Mr. Miller, whom they examined as a witness, made no attempt to contradict this. Their acquiescence is also shown by the testimony in the case, and that Wible requested the defendants to take the water away from them to prevent its doing them damage. They waited nearly four years after this before bringing their action. During this time vast sums of money were expended on the construction of this canal, and many third persons became interested by settling along its line.

We have, then, the case of plaintiffs, without bringing any action at law—without pretending to have suffered any actual damage—standing by for nearly the period of the Statute of Limitations, while a great work like this was being prosecuted, large sums expended, and important rights becoming vested; not only without opposition or complaint, but, so far as they acted, acquiescing affirmatively in the operation.

The whole testimony shows, that to sustain the claim of plaintiffs is to bring ruin upon whole communities; that to deny their claims is to inflict no appreciable damage upon them.

It is, if ever there was, a case of a bare technical right sought to be enforced by the remedial agency of a Court of Equity.

We submit, that here are all the reasons which have been adverted to in all the cases where under such circumstances of laches parties have been left to enforce their rights at law, and denied relief in equity.

This doctrine of laches is one inherent in Courts of Equity, and depends not at all upon the existence or

operation of statutes of limitation. "Another maxim is "*vigilantibus non dormientibus aequitas subvenit*, the meaning of which is sufficiently obvious. It is designed to provoke diligence, to punish laches, and to discourage the assertion of stale claims. By virtue of this maxim such claims are rejected in equity independently of any statute of limitations."

Bispham, Sec. 39.

"Although a Court of Chancery may have jurisdiction to prevent irreparable trespass, yet if the case presents questions of ownership, possession, dedication, etc., the parties will be remitted without prejudice to a Court of Law."

Hacker vs. Borden, 84 Ill., 313.

Bill to abate a nuisance.

Held: That delay for a year after knowledge to apply for relief against works which even then completely obstructed the street, standing alone disentitled complainants to the relief sought.

"The complainants have waited until at least a year after the whole work was completed before coming into Court for relief. Their property is in an unimproved part of the city. * * * They complain merely of the loss by means of the obstruction of a source of value to their property."

Meredith vs. Sayre, 32 N. J. Eq., 565.

Bill for injunction against diversion of water.

"*Held*: Bad; there being no averment of insolvency, or that the damages were not adequate compensation."

——— *vs. Babett*, 5 W. Va., 128.

"This remedy must be applied with the utmost caution, not applied if the injury be doubtful, eventual or contingent."

Huff vs. Doyleston, 4 Brewster, Penn. 333.

In *Varney vs. Pope*, a delay of three years after the diversion was held to disentitle the party to relief in equity.

Varney vs. Pope, 60 Me., 195.

See *Hermann vs. Beef Slough. supra*, and *Agacom Co. Case*, 36 Conn., 498.

Pascoe vs. Gross, 7 Phila., Pa., 317.

In *Nevada Co., etc. vs. Kidd*, the Court say: "The
 "second count presents no grounds for injunction or
 "equitable relief. It seeks only to restrain the com-
 "mission of naked trespasses, with nothing in the na-
 "ture of waste. There is no averment that the plain-
 "tiff ever, in fact, diverted the waters of Yuba River,
 "or actually applied them to any use whatever; or that
 "it ever was, or that it is yet, in a condition to divert
 "or use the water; or that it could now in any way use
 "it until plaintiff constructs a dam and canal, which
 "are now only in process of construction. Of course,
 "till the plaintiff can use the water itself, it can be no
 "injury for others to use it. The Court will not re-
 "strain the mere diversion of the water by others till
 "the plaintiff can make some possible use of it. It
 "does not appear that there is any injury for which a
 "recovery at law would not be a full, speedy and ade-
 "quate remedy."

Nevada Co., etc. vs. Kidd, 37 Cal., 307.

In *Creighton vs. Evans*, 53 Cal., 56, this Court decided that an action at law would lie without proof of actual damage. A reference to the transcript will show that the Court was especially requested to award equitable relief, and they would not do so, but referred the plaintiff to his remedy at law.

So in *Basey vs. Gallagher*, 20 Wallace, 679, the Court say: "There is nothing in the statutes or decisions of
 "California abolishing this rule; and that upon this
 "distinction between law and equity still preserved de-

“pends the substantial constitutional right of trial by jury.”

In *Atchison vs. Peters*, Id., 515, they say: “But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a Court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged; whether it be irremediable in its nature; whether an action at law would afford adequate remedy; whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a Court of Equity in the exercise of its preventive process of injunction.”

See also *Cummings vs. Barrett*, 10 Cushing, 190.

In *Stragne vs. Steer*, 1 R. I., 251, where equity refused to interfere on the ground of two and a half or three years' laches, the Court cite the following case: “A diverted a water-course, which put ‘B’ to great expense in laying sooths, etc., and the diversion being a great nuisance to ‘B,’ he brought his action” [at law], “but an injunction” [against the action] “was decreed upon a bill exhibited for that purpose, it being proved that plaintiff did see the work when it was carrying on, and connived at it, without showing the least disagreement, but rather the contrary. It is a principle of equity, that where a person has stood by, seeing an act done, and has consented to it, he cannot complain of that which he has himself expressly or impliedly authorized or permitted.”

The Court, in the exercise of its discretion in regard to the granting of an injunction, will, as we have seen, be influenced by any laches or delay which may have taken place in the institution of the proceedings.

vs. *Bank*, 12 Bevan, 1.

vs. *Guard*, Law Reports, 1 Eq., 388.

“Long delay may amount to absolute acquiescence
 “in the act complained of, and may, if unexplained,
 “certainly throw considerable doubt upon the reality
 “of the alleged injury.”

3 De Gray & J., 230.

Weeks vs. Hunt, 1 Jones, 372.

A man who lies by while he sees another person expend his capital and bestow his labor upon any work which he claims to have the right to prevent, without giving that person any notification, and who thus acquiesces in proceedings inconsistent with his own claim, shall in vain ask for an injunction, the effect of which will be to render all of the expense useless which he voluntarily suffered to be incurred.

Parrott vs. Palmer, 3 Myl. & Keene, 640.

Birmingham vs. Lloyd, 18 Vesey, 515.

vs. *Bassett*, 32 Law Journal, Ch. 286.

Maxwell vs. , Law Rep., 2 Ch., Ap. 267.

Addison on Torts., p. 1,232; *id.*, p. 1,279.

vs. *Yielding*, 2 Sch. & Le Froy, 552.

Delevan vs. Duncan, 49 N. Y., 488.

vs. *Parker*, 49 N. Y., 1.

Green vs. Covilland, 10 Cal., 317.

Bensley vs. Mountain Lake, 13 Cal., 316.

“From this statement of the evidence it is manifest
 “that the injury is not of the character that would call
 “for the interference of a Court of Equity when the
 “plaintiffs’ title had not been established at law; such
 “is clearly the doctrine of *Coe vs. Lake Co.*, 37 N. H.,
 “255; *Wason vs. Sandborn*, 45 N. H., 169; *Eastman vs.*
 “*Amoskeag Man. Co.*, 47 N. H., 71; and the question
 “is, whether a judgment in a suit at law establishing
 “that title would justify an injunction under the cir-
 “cumstances of this case. This involves an inquiry
 “into the general principles which guide the discretion
 “of Courts of Equity upon applications of this sort.
 “The power to grant injunctions to prevent injustice

"has always been regarded as peculiar and extraordin-
 "ary. It is not controlled by arbitrary and technical
 "rules, but the application for its exercise is addressed
 "to the conscience and sound discretion of the Court.
 "Ordinarily, it will not be exercised when the right of
 "the complainant is doubtful and has not been settled
 "at law; and even when it has been so settled an in-
 "junction will not be granted when the remedy at law
 "is adequate. It is not enough that an injury merely
 "nominal or theoretical is apprehended, even although
 "an action at law might be maintained for it, but to
 "justify the interposition of this summary power, there
 "must be cause to fear substantial and serious dam-
 "age for which Courts of law could furnish no ade-
 "quate remedy. What injuries shall be regarded as
 "irreparable at law must depend upon the circum-
 "stances of the particular case. If the injury be
 "trivial, as by slightly darkening a neighbor's win-
 "dows, or raising the water of a river a few inches
 "upon his rocky shore, doing him no appreciable or
 "serious damage, equity would not ordinarily inter-
 "fere by injunction; even in cases where the right as
 "had been established at law, for the power is extra-
 "ordinary in its character, and is to be exercised in
 "general only in cases of necessity, and when the
 "Court cannot see that the other remedies are inade-
 "quate to do justice between the parties, and even
 "then it is to be exercised with great care and dis-
 "cretion.

"If the granting of an injunction would necessarily
 "cause great loss to the defendant, a loss altogether
 "disproportioned to the injury sustained by the plain-
 "tiff, that fact should be considered in determining
 "whether the application should be granted, and in
 "some cases it would justly have great weight.

"It has often been supposed that when the right has
 "been established at law the plaintiff would be entitled
 "to an injunction as a matter of course; and this mis-
 "apprehension has arisen probably from the fact that

“ in a large number of cases injunctions have been re-
 “ fused upon the express ground that the title of the
 “ plaintiff had not been established at law, leaving
 “ room for the inference that if it had been so estab-
 “ lished the injunction would have been issued.

“ This, however, is clearly not the doctrine of Courts
 “ of Equity, for they will not ordinarily exercise this
 “ summary and extraordinary power when substantial
 “ justice can be done by Courts of law.

“ Such is the doctrine of our own Courts, as held in
 “ the recent case of *Wason vs. Sanborn et al.*, 45 N. H.,
 “ 169, and *Eastman vs. Amoskeag Man. Co.*, 47 N. H.,
 “ 71; and so it is distinctly held in *Wood vs. Sutcliffe*
 “ & *Simons*, N. S., 163. In *Wason vs. Sanborn, et. al.*,
 “ it was laid down by Bell, C. J., that to authorize the
 “ Court’s interference by injunction there should ap-
 “ pear imminent danger of great and irreparable dam-
 “ age, and not of that for which an action at law would
 “ furnish full indemnity. In *Eastman vs. Amoskeag*
 “ *Man. Co.*, Nesmith J., says plaintiff shows a case
 “ of strong and clear injustice of pressing neces-
 “ sities and imminent danger of great and irreparable
 “ damage.

“ In the *Attorney-General vs. Nichol*, 16 Ves., 337, it
 “ was held that an injunction against darkening ancient
 “ windows would not be granted in every case affecting
 “ the value of a building, though an action at law might
 “ lie. Lord Eldon says that the foundation of equity
 “ jurisdiction to interfere by injunction, is that sort of
 “ material injury to the comfort of those who dwell in
 “ the neighboring house, requiring the application of a
 “ power to prevent, as well as remedy, an evil; and again,
 “ he says, he repeats the observation of Lord Hardwicke,
 “ that the diminution of the value of the premises is not
 “ a ground; and there is as little doubt that this Court
 “ will not interpose upon every degree of darken-
 “ ing ancient lights and windows. At the same
 “ time he holds that an action in the case might
 “ be maintained in many cases which would not sup-

“port an injunction, and proof, therefore, that the
 “ancient lights were darkened without showing how
 “much, was not sufficient. This case, it will be seen,
 “was decided without regard to the fact whether the
 “title was or was not established at law. .

“In 2 Story’s Eq. Jur., Sec. 925, it is said that it is
 “not every case that will furnish a right of action against
 “a party for a nuisance, that will justify the interposi-
 “tion of Courts of Equity to redress the injury, or to re-
 “move the nuisance; but there must be such an injury
 “as, from its nature, is not susceptible of being ade-
 “quately compensated by damages at law; or such as,
 “from its continuance or permanent mischief, must occa-
 “sion a constantly recurring grievance, which cannot be
 “otherwise prevented by an injunction; and he lays it
 “down that a mere diminution of the value of property
 “by the nuisance, without irreparable mischief, will not
 “furnish any ground for equitable relief. So is *Dunn*
 “vs. *Valentine*, 5 Met., 8, where it was held that the
 “owner of a vacant house lot was not entitled to an in-
 “junction to restrain the exercise of an offensive trade
 “near it, although it might diminish the value of the lot,
 “upon the ground that the remedy at law was adequate.

“In *Begalow vs. Hartford Bridge Co.*, 14 Conn., 565, it
 “was held that to authorize an interference by injunction
 “there must be not only a violation of the plaintiff’s
 “rights, but such a violation as is, or will be, attended
 “with substantial and serious damage, and not merely a
 “technical or inconsequential injury, even although an
 “action at law might be maintained for it; and therefore
 “the Court refused to restrain the building of a cause-
 “way that would cause the water of Connecticut River to
 “rise more rapidly and higher on plaintiff’s land than it
 “otherwise would, it not appearing that it would materi-
 “ally affect the productions or injure the buildings. See
 “also *Attorney-General vs. Cleaver*, 18 Ves., 210, and
 “cases; *Hanson vs. Gardner*, 7 Ves., 305, and notes;
 “*Shreeve vs. Voorhees*, 2 Green Ch., 25; 2 U. S. Dig.,

“374, Sec. 102; *Van Winkle vs. Curtis*, 2 Green Ch., 422.

“To the point that the application is addressed to the sound discretion of the Court, are *Riddall vs. Bryan*, 14 Md., 444; 20 U. S. Dig., 530, Sec. 9; *Gray vs. Ohio and Penn. Railroad*, Grant's cases (Penn.), 412; 19 U. S. Dig., 380.

“Another principle which is held to govern the discretion of the Court in these cases is that the application for the injunction must be seasonably made, and therefore if it appear that the owner of the property supposed to be affected by a nuisance has allowed it to exist for several years, with knowledge of its existence, and without any objection, and especially if he has acquiesced in the claim of another to use and enjoy the subject of complaint as of right, and to expend money upon the strength of it, with his knowledge and without objection, Courts of Equity will decline to grant an injunction, but leave him to his remedy at law. Nor would it be necessary that this acquiescence should be such as to be a defense to a suit at law, although if a party stands by and sees another expend large sums of money in erecting what might in fact be a nuisance, and such party is aware that the other supposes he has a right to do what he is doing, and yet such party makes no objection, although aware of his rights, he would be estopped both at law and equity. So is *Adlin vs. Gove*, 41 N. H., 465.

“In the absence, however, of what would constitute an equitable estoppel, Courts will ordinarily decline to exercise this summary power, unless the party invoking it has used due diligence in making his application.

“In *The Rochdale Canal Co. vs. King*, 2 Simons, N. S., 78, this doctrine was fully recognized. There the defendant had taken from the plaintiff's canal water for making and condensing steam used by them to operate their mills upon the banks of the canal, when, by the law creating the canal corporation, the defendant had the right to take the water only for the purpose of con-

“*condensing* steam. It appeared that the defendant’s mills
 “were built in 1830, and water drawn from the canal for
 “condensing steam, and also for generating it, and for
 “other purposes, from that time down to 1847, with the
 “plaintiff’s knowledge and without objection until then,
 “and that defendant incurred great expense in con-
 “structing his works, relying upon the water so obtained.
 “In 1848 the plaintiffs brought an action at law against
 “the defendant for using the water for other purposes
 “than for condensing steam, and obtained a verdict for
 “one shilling damages, upon which judgment was event-
 “ually rendered. This bill for an injunction was filed in
 “February, 1851, and the Court decided that, after such
 “acquiescence, the plaintiffs were not entitled to relief in
 “equity, notwithstanding they had established their
 “right at law. The decision went entirely upon the
 “ground of the acquiescence of the plaintiffs, which
 “deprived them of the right to the aid of a Court of
 “Equity, whether it was a good defense at law or not.

“In *Wood vs. Sutcliffe*, 2 Simons, N. S., 163, an injunc-
 “tion was refused mainly upon the ground that the
 “plaintiff stood by while defendant was construct-
 “ing his works, and suffered him to use them
 “from the beginning of 1845 until the beginning
 “of 1850, without giving him any hint that he
 “was doing what he had not a lawful right to do.
 “The application was to restrain the defendant from
 “pouring into the stream, on which both plaintiff and
 “defendant had mills, the refuse from defendant’s mill,
 “the plaintiff having established his right in 1850 by a
 “suit at law, although the damages recovered were only
 “nominal. It appeared, also, that other mill owners
 “discharged their refuse into the same stream, and were
 “paying to the plaintiff for the privilege of doing so at
 “the rate of £2 per annum per horse-power, having made
 “that arrangement to avoid litigation. The Vice Chan-
 “cellor was of the opinion that the injury might be com-
 “pensated in money, and that the injunction ought to be
 “refused on that ground, holding that as the plaintiff de-

“sired to apply a certain pressure to bring the defendant
 “to terms, he ought to be left to the pressure which may
 “be applied by means of an action at law.

“In the case of the *Birmingham Canal Co. vs. Lloyd*, 18
 “Ves., 515, where the danger apprehended was of a very
 “serious nature, the drawing off the water of the great
 “reservoir of the canal, the injunction was refused by
 “Lord Eldon because the plaintiff had delayed coming
 “to the Court till two years after notice from the defend-
 “ants that they proposed to work their colliery, during
 “which two years they had expended £2,000 in provid-
 “ing engines, etc., for their works, although the plaint-
 “iffs, on receiving the notice, had notified the defendants
 “that a suit at law would be commenced if they pro-
 “ceeded to open the levels or channels connected with
 “the reservoir.

“So in *Ripon et al. vs. Hobart*, 3 Mylne & K., 169,
 “where an injunction was sought to restrain the defend-
 “ants from erecting a steam engine for the purpose of
 “raising water from certain low lands which they wished
 “to drain, and throwing it into the river Wetham, to the
 “great injury, as the plaintiffs alleged, of the banks of
 “that river, which plaintiffs were bound to keep in re-
 “pair to prevent the flooding of the lands adjoining, it
 “was held that due diligence had not been used by the
 “plaintiffs, they having delayed application for the in-
 “junction for the space of nine months after defendants
 “had commenced and made considerable progress, and
 “expended money therein. In both of these cases the
 “right of the plaintiffs had not been established at law,
 “but the injury apprehended in both cases was of a very
 “serious character, and irreparable in its nature.

“*Barrett vs. Blagrove*, 6 Ves., 104, was an application
 “for an injunction to restrain the breach of a covenant,
 “but it was refused upon the ground that, after eleven
 “years’ acquiescence, the plaintiffs must take their
 “chance at law.

“In *Binney’s Case*, 2 Bland., Ch. 99 (Md.), it is held
 “that to authorize an injunction it must appear that the

“applicant has acted promptly, and has not impliedly
 “authorized what he now objects to, by his laches or
 “acquiescence. If he applies to stay operations upon a
 “large and costly work, it should appear that he applied
 “for an injunction as soon as he became apprised of his
 “rights and the extent of the threatened injury. See ab-
 “stract in 2 U. S. Equity, Dig. 65, Secs. 17, 18.

“So, standing by and seeing money expended in erect-
 “ing mills to be operated by a certain stream without
 “objection, is a waiver. *Jacox vs. Clark*, Walk., Ch.
 “429 (Mich.); 2 U. S. Eq., Dig. 70, Sec. 137.

“So acquiescence may defeat the application for an in-
 “junction, though not sufficient to defeat a suit at law.

“*Gray vs. Ohio & Penn. Railroad*, 1 Grant's Cases,
 “412; see also *Dunn vs. Sprevier*, 7 Ves., 235, and notes.

“Upon these principles we are satisfied that an injunc-
 “tion ought not to be granted.

“In the first place, we think that the injury to these
 “three lots of land is not of such serious and irrepara-
 “ble character as to demand the interference of this
 “Court by way of an injunction, especially in view of
 “the serious loss and damage it would naturally cause
 “the defendants; arming, as it must necessarily do, the
 “plaintiff with the power of exacting from the defendants
 “large sums of money, limited, as it would seem, only
 “by his sense of what he could conscientiously ask as an
 “indemnity for the injury to all these lands, and the ex-
 “penses attending the long protracted litigation, includ-
 “ing the services bestowed by himself in the prosecution
 “of the several suits between them. Independent, how-
 “ever, of the effect upon the defendants, we think that,
 “in respect to the three lots the plaintiff has an adequate
 “remedy at law. In the most serious aspect in which it
 “can be viewed, the injury to these lands is but trifling.
 “The prices paid for the whole five and a half acres was
 “\$207—about \$37.50 per acre—mostly selected from
 “larger pieces with a view to flowage. Of this quantity
 “a little more than a half an acre appears to be flowed
 “in two places, one-quarter of an acre each; in one

“ eleven and three-fourths rods, and another a piece of a
 “ steep bank, how much does not appear. These pieces
 “ are not shown to be productive, or that they ever were;
 “ on the contrary, most of it appears to be wet or swamp
 “ land; and it does not appear that they are connected
 “ with other lands, so as to make it essential that the
 “ water should be withdrawn during the summer months;
 “ and it will be observed that defendants have the right
 “ to keep up the water from October 12th to May 12th in
 “ each year.

“ We cannot, under these circumstances, regard the in-
 “ jury of such a serious character as to call for the inter-
 “ ference of this Court. On the contrary, we regard it as
 “ nothing more than an ordinary case of a diminution of
 “ the value of land, which can be adequately compen-
 “ sated at law; and in this we are sustained by the case
 “ of *Wason vs. Sanborn et al.*, and *Eastman vs. Amoskeag*
 “ *Man. Co.*, before cited.

“ Upon the ground of acquiescence, or laches, we
 “ think the injunction ought not to be granted. For
 “ seven or eight years the owners of these lands have
 “ stood by and witnessed the flowing of them, without
 “ objection; and, although it may not constitute a good
 “ defence to a suit at law, it furnishes a decisive objec-
 “ tion to the interposition of a court of equity. The au-
 “ thorities already cited establish the general rule, and
 “ there is nothing to take this case out of it. There was
 “ clearly an acquiescence of seven or eight years before
 “ any hint was given of any claim for compensation, and
 “ under circumstances, too, that called for notice if any
 “ substantial injury was sustained, and during this time
 “ the Salisbury Manufacturing Company expended large
 “ sums in extending their works.

“ In several of the cases cited an injunction was re-
 “ fused when the acquiescence was for a much shorter
 “ time; and we are satisfied that there is nothing here to
 “ distinguish the case favorably for the plaintiff from
 “ many of the cases cited.”

Bassett vs. Company, 47 N. H., 437, A. D. 1867.

That the finding of "laches" is abundantly sustained, *i. d.*

Banks vs. Fairbanks, 49 N. H., 144.

Peabody vs. Flint, 6 Allen, 67.

Nasser vs. Seely, 10 Neb., 460, was a bill to enjoin the flowing of land by milldam. The defendant commenced his building June 15, 1878, and finished March 25, 1879, at an expense of about \$15,000. On or about the first day of August, 1878, defendant had expended \$4,000. From the time he commenced, June 15, 1878, till August 1, 1878, complainant well knew that the defendant was expending large sums in the mill and dam, and that if completed it would bulk the water in his dam. Notwithstanding such knowledge he allowed the defendant to proceed without objection, and solicited employment in the construction of the work he now seeks to enjoin. *Held*, fatal laches.

See *Weber vs. Marshall*, 19 Cal., 458.

Corning vs. Troy, 40 N. Y., 205, was much relied upon by appellants below, but that case is clearly distinguishable from this. That action was for damages and to restrain the diversion of the water-course. Grover, J., in delivering the opinion of the Court, held that equity had jurisdiction, first, upon the ground that the remedy at law is inadequate, as legal remedies cannot restore the flow of the stream; and second, to avoid multiplicity of actions; In answer to the points of laches, and that title had not been settled at law, he said:

"It is insisted that the equitable right of restoration has been lost by delay. The Statute of Limitation, either at law or in equity, has not attached so as to bar the right. The case has, therefore, no analogy to that class of cases where equity has refused relief upon the ground that the legal remedy was barred by the statute. *The defendant has expended no money upon improvements since the expiration of the*

“*lease*; consequently the principle of the cases holding
 “that where, during the delay of a party in asserting
 “his right, expenditures have been made in improve-
 “ments, equity will not interfere, do not apply. *Lewis*
 “*vs. Chapman*, 3 Beavan, is one of this class. The
 “plaintiff sought to restrain by injunction the publica-
 “tion of a work of which he was the owner of a copy-
 “right. It appeared that he had lain still for six years
 “and upwards, and seen the defendant expending his
 “money in printing the work, etc., etc.; upon this
 “ground equity refused to relieve the plaintiff. There
 “are numerous cases of this description found in the
 “books, but they all rest upon the same principle. *
 “* * *

He further states that formerly the universal rule was that equity will not interfere until a right had been settled at law; but claims that that rule no longer prevails in New York.

See, however, *Lacustrive vs. L. Y., etc.*, 82 N. Y., 485, that a relaxation of the rule in New York has only gone to the extent of holding that the establishing of a title at law is *not indispensably necessary*; but that in the discretion of the Court they can still insist upon the former universal rule; and the appellate Court will not interfere with such discretion.

Woodruff, J., who, it seems, also delivered the opinion of the Court, said: “It therefore is not the case of
 “a plaintiff lying by when his legal right is invaded,
 “and permitting his adversary to expend large sums of
 “money in valuable improvements, and then invoking
 “the aid of a Court of Equity to enforce his legal
 “right, at a great loss or sacrifice by the defendant,
 “resulting from the plaintiff’s delay;” of which exam-
 ples are stated in the opinion in the former argument. These improvements were voluntarily made during a time when there was neither right nor motive to object thereto.

There were eight Judges, and of these five concurred

in the foregoing opinion; the other three holding that the plaintiff should be confined to his legal remedy in damages, and that the equitable relief by injunction should be denied on the ground of a great loss and injury to the work, and slight advantage to plaintiffs from a restoration, assent during the lease to expensive improvements, and delay in suing after the lease. The opinion of Hopboom in the same case, as reported in 39 Barb., shows the same distinction between that case and this, and sustains our principle; and that if the expenditures of defendant in *Corning vs. Troy* had been made like those of defendants here, the contrary would have been held. But all turned on the fact that the expenditures were made while defendant had a lease, with thirteen years yet to run, and therefore plaintiff had no right to object.

P. C. "It is because a party stands silently by and sees an injurious and unwarrantable act done to his property, and does not protest against it, *that he is regarded* as tacitly acquiescing in the propriety of such act, * * and shall not be permitted thereafter to question it when such a course would work damage to an innocent party." (39 Barb., 324).

In a late case, where an injunction as against a nuisance had been granted in favor of an *infra vs.* a *supra*-proprietor, the Court, after showing that such injunction would enable the lower proprietor to make a use of the stream from which the upper would at times be excluded, and without the burden of restraint, which to the other might at times be very serious, and would also enable the lower to annoy the other by insisting upon requirements which might benefit him much less than they would inconvenience his neighbor, say: "In the case of rights like those here in question that process (injunction) is not only troublesome, but susceptible of great abuses, from the extreme difficulty of laying down any precise rule that will fit the varying circumstances. Except in very clear cases, it is generally

“better to leave the parties to their legal remedy in the recovery of damages. Decree reversed and bill dismissed.”

Hoxsie vs. Hoxsie, 38 Mich., 77.

To the same effect, and that the remedy by injunction is not of right, but of grace—that it is discretionary with the Court below whether to grant or refuse an injunction in cases like this, where there is no proof of insolvency and the damage is trifling and capable of compensation in money, even though the act is a nuisance and technically a waste. The facts were that the plaintiff was the prior appropriator of public land and water, which he had devoted to beneficial uses—milk ranch, irrigation, fruit trees, etc.; and defendants subsequently locating above him, claimed the right as miners to foul the water and destroy his improvements.

Slade vs. Sullivan, 17 Cal., 107.

In *Parke vs. Kilham*, 8 Cal., 78, the following instruction was approved as law in this State:

“If those from and through whom the plaintiff’s claim had the prior right to the waters in the middle fork of Jackson Creek, and they stood by and saw those from whom defendant derives his title to the ditch, and the right to the waters of the said creek, appropriate the waters of the creek, at a great expenditure of money and labor, under the mistaken idea that the defendant’s vendors were obtaining the first appropriation, and did not inform them of the mistake, that they, plaintiff’s vendors, and the plaintiffs who claim under them, are estopped from setting up their prior right at this time.”

In *Edwards vs. Allavez Co.*, 38 Mich., 46, a bill by riparian infra proprietor to obtain a perpetual injunction against a nuisance committed by fouling the stream, and consequently absolutely destroying and covering with debris complainant’s land. The decree

below, which was affirmed on appeal, denied all equitable relief on the ground that the remedy was at law. The Court say that the mining operations of defendant could not be carried on with profit without doing the acts complained of; that the value of plaintiff's land *to plaintiff* was small, it not having been purchased for use or occupation, but as a matter of speculation, and apparently expecting to force defendant to purchase it; "that the operations of defendant, whether they inflict "any serious injury on complainant or not, amount in "effect to an appropriation of that portion of his property upon which sand is being deposited. It follows, "and is beyond question, that complainant sustains a "legal injury for which he is entitled to suitable redress. The only question in this record is, whether "he is entitled to the special redress he seeks, namely, "an injunction. An injunction is not a process to be "lightly ordered in any case. Where the effect will be "to present to the owners of a valuable mill the alternative either to purchase complainant's lands at his "own price, or to sacrifice their property, any Court "having the power to order it ought very carefully to "scrutinize the case, and make sure that equity requires it. In theory its purpose is to prevent irreparable mischief; it stays an evil, the consequences "of which could not adequately be compensated if it "were suffered to go on."

(Citing cases.)

"The writ 'is not' *ex debito justitiae* for any injury "threatened or done to the estate or rights of a person, "but the granting of it must always rest in sound discretion, governed by the nature of the case." *Enfield Toll Bridge Co. vs. Connecticut River Co.*, 7 Conn., 50. As is said in another case: "Injunction is not of right "but of grace; and to move an upright Chancellor to "interpose this strongest arm of the law, he must have "not a sham case, but a well-grounded complaint, the "*bona fides* of which is unquestioned, or capable of vindication if questioned." *Kenton vs. Railway Co.*, 54

Penn. St., 454. "There is no power," says Mr. Justice Baldwin, "the exercise of which is more delicate, "which requires greater caution, deliberation, and "sound discretion, or is more dangerous in a doubtful "case than the issuing of an injunction. It is the strong "arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot "afford an adequate or commensurate remedy in damages." *Bonaparte vs. Camden, etc., R. R. Co.*, Bald., 218. All the cases referred to show that the Court looks beyond the actual injury to contemplate the consequences, and however palpable may be the wrong, it will still balance the inconveniences of awarding or denying the writ, and adjudge as these may incline the judicial mind. *Gray vs. Ohio, cct., R. R. Co.*, 1 Grant, 412; *Varney vs. Pope*, 60 Maine, 192; *Bosley vs. M'Kim*, 7 Har. & J., 468. Even in the case of the palpable violation of a public right to the annoyance of one individual, he must show the equity which requires this summary interference as the only adequate means of obtaining justice. *Sparhawk vs. Union Passenger Railway Co.*, 54 Penn. St., 401. * * *

"The complainant is entitled to his rights under the "rules of law, but * * to nothing of grace. * * "Defendant is not alleged to be irresponsible, and a "jury, it is supposed, will award all that is reasonable. "If complainant wants more than is reasonable, he has "a right to obtain it under the rules of law, but he cannot demand the aid of equity in a speculation. * * "The elements of irreparable injury are entirely wanting to his case. Our conclusion is that the Circuit "Court gave the complainant all he was entitled to "when the case was sent to a jury. The decree must, "therefore, be affirmed with costs."

This statement by Judge Cooley is pertinent here, and was carefully made after full argument, in which the authorities relied on by appellant, such as *Corning vs. Troy*, were cited. It shows that the true principle is the one always inherent in equity jurisdiction—the

distinction between rigid law and flexible equity—between the remedy which is of right and that which is of grace; that the mere fact that the injury is to “realty;” that it consists in abstracting what cannot be replaced *in specio* does not necessarily make out a case of “irreparable injury;” nor does the fact that water is diverted or fouled necessarily call for the taking of jurisdiction by equity, upon the maxim of preventing a “multiplicity of action.” Here this Michigan case accords with the California doctrine as held in *Slade vs. Sullivan*, 17 Cal., and elsewhere.

Bill for injunction to restrain construction of sewer on plaintiff's land. Pursuant to ordinance, approved April 22d, 1870, defendants took possession.

P. C.—“The defendants are engaged in the construction of an important public work, the speedy completion of which, it would seem, is indispensable to the proper protection of the public health. In such a case this Court must not put in force its prohibitory power unless it is the only means by which adequate redress can be given. To induce the Court to act there must be promptitude, an invasion of a clear right, and no other adequate remedy. It is undisputed that the complainants have permitted the public authorities to oust them, and to take possession of the land they now claim, and to expend, in preparing it for use as a public street, a large amount of public funds; and that since it has been so prepared they have stood by quietly and permitted it to be constantly appropriated to the purposes of a public highway. Under these circumstances I take it to be too clear for argument that they have so far encouraged or sanctioned the action of the public authorities as to divest themselves of the right to demand that a *Court of Equity* shall now, by its introduction, deprive the public, even temporarily, of the benefit of its expenditures. (*M. and E. R.R. Co. vs. Prudden*, 5 C. E. Gr., 530; *Easton vs. N. Y.*, 9 C. E. Gr., 49).”

"This Court will even refuse to exert its prohibitory
 "power in aid of rights asserted on behalf of the State
 "when it appears that its representations by silence
 "and inaction have *presumably* encouraged the outlay
 "of large sums of money in the prosecution of an im-
 "portant public enterprise, undertaken in good faith,
 "and which, if arrested, would bring disaster upon its
 "projectors. *Attorney-General vs. Delaware, etc.*, 12 C.
 "E. Gr., 1. The complainants by laches, if not by ac-
 "quiescence, have lost all right to have the use of this
 "street forbidden. By delay they have made it impos-
 "sible for the Court to give them the special relief
 "they ask for without doing great and irreparable in-
 "jury to the public; *they have, therefore, no claim to such*
 "*relief as it is the peculiar province of Courts of Equity to*
 "*give, but must be left to pursue their ordinary legal rem-*
 "*edy.* * * * * * Now, when the public au-
 "thorities have reached a point in the prosecution of
 "the work—when retreat is impossible—this Court is
 "asked to stretch forth its arm. The appeal comes too
 "late; besides, there is reason to believe the complain-
 "ant's delay was designed. * * * * * On June 14,
 "1870, the complainants presented a remonstrance to
 "the defendants against the proceedings already taken
 "for the opening of this street. This did not relieve
 "them from the consequences of their subsequent
 "laches. *Easton vs. N. Y., supra.* Besides, the re-
 "monstrance did not deny a dedication, but simply
 "disputed the regularity of the proceedings for open-
 "ing."

Traphagen vs. Mayer, 29 N. J. Eq., 208.

An appeal was taken, but the decree was unani-
 mously affirmed."

Ibid, 650.

Suit to restrain a nuisance. P. C.

"To grant their (complainants') prayer is to destroy
 "defendant's business. Power attended with such

“disastrous consequences should always be exercised
 “sparingly, and with the utmost caution. All doubts
 “should be resolved against its exercise. *Att’y. Gen’l.*
 “*vs. Nichol.*, 16 Ves., 338. Relief by injunction in such
 “cases is not a matter of right, but rests in discretion.
 “If the legal right is not clear, or the injury is doubt-
 “ful, eventual or contingent, *equity* will give no aid.
 “(Richard’s Ap., 57 Pa. St., 105; *Rhodes vs. Dunbar*,
 “*id.* 274; Huckenstein’s App., 70 Pa. St., 102.) And
 “so, too, the Court is bound to compare consequences.
 “If the fact of an actionable nuisance is clearly estab-
 “lished, then the Court is bound to consider whether
 “a greater injury will not be done by granting an in-
 “junction, and thus destroying a citizen’s property,
 “and taking away from him his means of livelihood,
 “than will result from a refusal, *and leaving the injured*
 “*party to his ordinary legal remedy*; and if, on thus con-
 “trasting consequences, it appears doubtful whether
 “greater injury will not be done by granting than by
 “withholding the injunction, it is the duty of the Court
 “to decline to interfere. *Kelton vs. Earl*, 1 Cr. & H.,
 “283. The duty of granting or refusing an injunction
 “is a matter resting in sound discretion. It should
 “never be granted where it will operate oppressively, or
 “*contrary to the real justice of the case*, or when it is not
 “the fit and appropriate method of redress under all
 “the circumstances of the case, or when it will or may
 “work fatal injury to the person enjoined. *Jones vs.*
 “*City*, 3 Stockb., 452. Mr. Justice Depue, speaking
 “for a majority of the Judges of the Court of Errors
 “and Appeals, in *Morris and Essex vs. Pudden*, supra,
 “said: ‘It must be a strong and mischievous case of
 “‘pressing necessity, or the right must have been pre-
 “‘viously established at law, to entitle a party to an
 “‘injunction; * * * and the writ ought not to be
 “‘granted where the benefit secured by it to one party
 “‘is of but little importance, while it will operate op-
 “‘pressively, and to the great annoyance and injury of
 “‘the other, unless the wrong complained of is so

“ ‘wanton and unprovoked in its character as properly
 “ ‘to deprive the wrongdoer of the benefit of any con-
 “ ‘sideration as to its injurious character.’ * * * Per-
 “ ‘haps the most accurate statement * * is that given
 “ ‘by Mr. Justice Mellor * * * in 1863. He said:
 “ ‘Every man is bound to use his own property in such
 “ ‘manner as not to injure the property of his neigh-
 “ ‘bor. * * * But the law does not regard trifling
 “ ‘inconveniences; everything must be looked at from
 “ ‘a reasonable point of view; and therefore in an
 “ ‘action for nuisance to property * * * the in-
 “ ‘jury, to be actionable, must be such as visibly to
 “ ‘diminish the value of the property and the comfort
 “ ‘and enjoyment of it. In determining whether a
 “ ‘nuisance exists or not, the time, locality and all the
 “ ‘circumstances should be taken into consideration.
 “ ‘In countries where great works have been erected
 “ ‘and carried on, which are the means of developing
 “ ‘the sectional wealth, persons must not stand on ex-
 “ ‘treme rights.’ * * * This direction was
 “ ‘approved first by the Court of Queen’s Bench
 “ ‘(*Tiffing vs. St. Helen’s*, 4 B. & S., 608), and after-
 “ ‘wards by the Exchequer Chamber (4 B. & S., 616),
 “ ‘and finally by the House of Lords (*St. Helen’s vs. Tif-
 “ ‘fing*, 11 H. of L., cases 642.) This must be regarded
 “ ‘as a final settlement of the law in England. The
 “ ‘Court should always, in cases of this kind, consider
 “ ‘the customs of the people, the nature and character
 “ ‘of their employment, and the circumstances and sur-
 “ ‘roundings of the business which is alleged to be a
 “ ‘nuisance.’ ”

Demorest vs. Hardham, 34 N. J. Eq., 473.

Campbell vs. Seaman, 63 N. Y., 584., another of the cases relied on by appellants below, belongs to the class of cases, among which *Demarest vs. Hardham*, cited by us, is conspicuous for conclusive reasoning and exhaustive research. In so far as they differ, we confidently submit the reasoning of each. But *Camp-*

bell vs. Seaman sustains us. The Court then say (p. 585): "It is true that if a party sleeps on his rights and allows a nuisance to go on without remonstrance or without taking measures, either by suit at law or in equity, to protect his rights, and allows one to go on making large expenditures about the business which constitutes the nuisance, he will sometimes be regarded as guilty of such laches as to deprive him of equitable relief." Again (p. 586): "Where the damage to one complaining of a nuisance is small or trifling, and the damage to one causing the nuisance will be large in case he is restrained, the courts will sometimes deny an injunction. But such is not this case; here the damage to the plaintiffs, as found by the referee, is large and substantial. It does not appear how much damage the defendant will suffer from the restraint of the injunction." They then go on to show that defendant's works are not expensive—that he will suffer little or no injury by being compelled to put his land to such uses as would not injure others, and that his damage from an abatement will not be as great as plaintiff's from a continuance of the nuisance, and concludes: "*Hence, this is not a case within any authority to which our attention has been called, where an injunction should be denied on account of the serious consequences to the defendant.*" Again (p. 584): "There was no acquiescence or laches which should bar the plaintiffs, *within any rule laid down in any reported case.*" (P. 582.) True, they say that *now* injunction is "matter of grace in no sense except that it rests in the sound discretion of the Court, and that discretion is not an arbitrary one. * * * If improperly exercised, * * * to be corrected on appeal." To this many authorities are cited. One is *Parker vs. Winnipiseagee & Co.*, 2 Black (U. S.), 546. There is here a party claiming as riparian proprietor on a large stream issuing from a lake sued in Chancery. The bill was dismissed for want of jurisdiction, because remedy was at law for damages. The defendants had

deepened the outlet of the lake, and also constructed a stone dam, so that in wet times they could utilize and store what would otherwise have gone to waste, and in seasons of drouth could thus increase the flow, or diminish at other periods. The complainant planted himself on his alleged common-law riparian right to have the water flow undisturbed, etc. The defendants were not riparian proprietors any more or otherwise than defendants here are. The principles laid down by the Supreme Court of the United States are simply those for which we contend and those enunciated in the cases we have cited. P. C. "It was urged at the hearing, as an insuperable objection to the relief prayed for, that the appellant has not established his right by an action at law. The objection was not taken by demurrer, or in the answer. In the Courts of the United States it is regarded as jurisdictional, and may be enforced by the Court *sua sponte*, though not raised by the pleadings nor suggested by counsel. * * "Where the remedy at law is of this character" (plain, adequate and complete—as practical and as efficient to the ends of justice and to its prompt administration as to the remedy in equity) "the party seeking redress must pursue it. In such case the adverse party has a constitutional right to trial by jury. The concurrent jurisdiction of courts of equity in cases of private nuisance * * is now too firmly established to be shaken, *but it is not without limitation. It is governed by the same principles which animate and control its action in other cases where its aid may be invoked against a wrong-doer.*" * * *

A diminution of the value of the premises without irreparable injury is no ground for interference. 2 Bro., C. C., 65; 16 Vesey, 342; 3 M. & K., 169. When an injunction is granted without a trial at law it is usually upon the principle of preserving the property until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been *no improper delay*. The Court will consider all the circum-

stances, and exercise a careful discretion. Cr. & Ph., 283. * * *

A delay of three years or more has been frequently held to be such laches as will preclude a party from relief in equity until he has vindicated his right at law. 1 Cax., 102; 2 J. C. R., 379; 3 J. C. R., 282; 6 J. C. R., 19; 5 Met., 8.

The better opinion now is, that it is only a fact to be considered by the Chancellor in connection with the other facts of the case by which his discretion is to be guided.

Woods vs. Sutcliff, 8 El. & E., 217.

Sprague vs. Rhodes, 4 R. I., 304. * *

The case must be one of strong and imperious necessity, or the right must have been previously established at law. * * After the right has been established at law, a Court of Chancery will not, *as of course*, interfere by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case. 4 R. I., 301; 8 El. & E., 104; 18 E. Cond., ch. 436. The excavation was made * * in 1846. The stone dam was erected in 1851. The appellant brought his bill on the 18th of September, 1855. * * If he has been injured, his injury can be ascertained and fully repaired by damages in an action of law. A jury is the tribunal provided by law to determine the facts and to fix the amount, and they can best perform this duty. * * The appellant can have no standing in a court of equity until he has laid this foundation for relief. This objection is fatal to the case. There are cases in which a court of equity will take jurisdiction, and give a complete remedy, without the previous intervention of a court of law. (Citing cases.) But this case does not belong to that class.

An English case cited, only decided that there was a clear legal right and a substantial, not a technical damage.

It arose under a statute changing the rule, which

stated that having enacted what it could not constitutionally enact, and it is said that without that statute the action would first have been sent to be tried by law.

Webber vs. Gage, 39 N. H., 182, is also cited, but we have cited later New Hampshire cases showing the doctrine in that State to be exactly as we claim it, and besides *Webber vs. Gage* is nothing but the California doctrine of *Chapman vs. Tuolumne*, 8 Cal., and what is more important, the opinion in *Webber vs. Gage* fits our case exactly, and draws the proper distinction between the cases, showing that if we had asked to enjoin plaintiff from disturbing our right, the case decided would have been presented.

Wood vs. Sutcliffe, 2 Simons (N. S.), 166, is also cited, and as the case is singularly in point, we will extract largely from it. It was a bill to enjoin the pollution of a water-course as being a nuisance. The plaintiffs *had established* the title by a verdict in an action at law brought in 1850. P. C. “ * * I cannot assent to the “proposition that on the mere dry fact of the plaintiffs “having the abstract right, a court of equity will, as a “matter of course, on that right being established at “law, grant an injunction, if the right be infringed “ever so minutely. On the other hand, I am far from “saying that because, in the action at law, the jury has “given only a shilling or a farthing damages, that is a “ground for concluding that the injury is not serious “and that the case is one in which an injunction is not “to be granted. * * * No doubt there was a time, “and probably not a very remote one, when the stream * * * flowed through open fields, pure and unpolluted, to the plaintiffs’ mills. But whenever human “beings congregate in large numbers on the banks of a “stream, the inevitable consequence is that * * * “sewerage * * necessarily has the effect of polluting it. * * Not all the courts of law and equity “in the kingdom can prevent it; for they cannot remove the mass of human beings who are congregated “on the banks of the stream. * * On the other

“hand, to grant the injunction would have the effect of
 “seriously injuring, if not ruining, the defendants.
 “Weighing, then, the injury that may accrue to the
 “one party or the other by granting or refusing the
 “injunction, I think, if my decision were to turn on
 “this point alone, I should be bound to refuse it.”
 After stating that plaintiffs, by threat of suit, forced
 others who were polluting the stream to settle by pay-
 ing a certain price per annum for the right of polluting
 the water:

“Now, if such an arrangement as that can be made,
 “ought I to grant an injunction in order to compel the
 “defendants to enter into it, when the bringing of an
 “action would be almost (I will not say quite) as effica-
 “cious? If the plaintiffs desire to apply to the defend-
 “ants a certain pressure in order to bring them to
 “terms, I think that I ought to leave plaintiffs to that
 “pressure. * * If the plaintiffs brought an action, and
 “the matter being represented to the jury, the jury
 “were satisfied that the defendants ought to come to
 “terms, they might give the plaintiffs £50 or £100
 “damages, instead of a farthing, etc. * * On the
 “ground, therefore, that the plaintiffs themselves have
 “shown that the injury they complain of is one which
 “in some way may be compensated by money, I think
 “I ought not to grant the injunction. But I do not
 “rest my decision upon either of the grounds which I
 “have mentioned. *The principal ground upon which I*
 “*conceive that I must refuse this injunction is that the*
 “*plaintiffs have not used due diligence in vindicating their*
 “*their rights. They stood by whilst the defendants were*
 “*constructing their works, and they suffered the defendants*
 “*to use their works after they were constructed, from the*
 “*beginning of 1845 until the beginning of 1850, a period*
 “*of very nearly five years, without giving them any hint*
 “*that they were doing anything that they had not a lawful*
 “*right to do; and if there had been nothing else in the*
 “*case, I should have been of opinion, on this ground*
 “*alone, that the plaintiffs were not entitled to the injunc-*

"tion. I incline to think, also, that the injunction
 "ought to be refused on the ground that the injury
 "complained of is capable of being compensated by
 "money; and in my opinion, it ought also to be refused
 "on the ground that the granting of it would inflict se-
 "rious damage upon the defendants, without doing any
 "real, practical good to the plaintiffs.

"*Campbell vs. Leaman* is althgether unlike this case
 "in all essentials. It was not for diversion of water,
 "but for a nuisance which was destroying valuable im-
 "provements and a house erected and improved at great
 "expense, without any knowledge of the nuisance. No
 "injury resulted to defendant, who did not even own
 "the land on which the nuisance was, and that land
 "could be applied without loss and with equal profit to
 "other uses. There was no expenditure of moment by
 "defendant, and plaintiff had warned him in time and
 "did sue him as soon as he found out the nature and
 "extent of the injury.

"Where the jury find that the rebuilding of a pro-
 "posed mill and dam would overflow and render use-
 "less the plaintiff's land and injure the health of his
 "family, but that the mill would be a public conveni-
 "ence, pecuniary compensation is all the plaintiff can
 "claim, and an injunction against such erection will be
 "refused, upon the principle that private advantage
 "must yield to public benefit (2 Dev. Eq., 38).

"*Daughtry vs. Warren*, Oct. Term., 1881, Sup.
 "Ct., N. C.

"*Brown vs. Carolina Central*, 83 N. C., 128.

"In *Fuller vs. Inhabitants*, 1 Allen, 166, plaintiff asked
 "to enjoin appropriation of town money. The petition
 "was presented January 8, 1858. The vote of the town
 "to do the work and to raise and appropriate the mon-
 "ey to pay for it passed March 2, 1857. Before filing
 "petition the work had substantially been done.

P. C. "We think these facts are decisive against the
 "claim of the petitioners for equitable relief, and that

“the case is clearly within the doctrine stated in *Tush*
 “vs. *Adams*, 10 Cush., 252. It was said by the Court
 “in that case that ‘it is a well established rule in
 “‘equity that if a party is guilty of *laches* or unreason-
 “‘able delay in the enforcement of his rights, he there-
 “‘by forfeits his claim to equitable relief;’ and that
 “‘this rule is *more especially* applicable to cases where a
 “‘party, being cognizant of his rights, does not take
 “‘those steps to enforce them which are open to him,
 “‘but lies by and suffers other parties to incur expenses
 “‘and enter into engagements and contracts of a bur-
 “‘densome character. * * * Here, then, was a de-
 “‘lay of ten months, without reason or excuse, so far as
 “‘appears, as has been suggested. Petition dismissed.’”

So in California.

Bill to enjoin waste in quartz mine:

P. C. “It appears that the defendants have been in
 “possession of the quartz ledge in question for several
 “months, have expended large sums of money in de-
 “veloping and working the same, and were at the time
 “of granting the injunction and had for some time pre-
 “viously been working the mine as their own. In such
 “case it requires a very clear and strong showing to
 “induce a Court of Equity to grant or sustain an in-
 “junction to stop the work. There must be an urgent
 “necessity, and, as a general rule, the title and right
 “of the plaintiffs should be shown to be clear, well-
 “established, and not in dispute. The application
 “should also be made promptly, and not delayed until
 “large expenditures have been made by the defend-
 “ants,” citing many cases.

“When the title to the property is in dispute * * *
 “the extent of inconvenience and expense to which
 “the defendant would be subjected by the granting of
 “the injunction, as compared with the injury the
 “plaintiff would be likely to suffer if refused, often
 “forms an important consideration in determining the
 “right to an injunction. * * * The question whether

“ the defendants are solvent, and able to respond in
 “ the damages, * * * is often an important one.
 “ * * * The plaintiffs have set up no circum-
 “ stances of this kind to sustain their application for
 “ an injunction.”

Real Del Monte Co. vs. Pond Co., 23 Cal., 84.

“ Five years held such laches and acquiescence as to
 “ defeat bill for injunction to remove building.”

Gaskin vs. Ball, L. R., 13 Ch., Div. 326.

Seven years delay held laches, and bar to equitable relief, property having appreciated in value.

P. C.—“Taking into consideration the inevitable
 “ publicity of most of the proceedings, the dates at which
 “ they occurred, and the ample means of knowledge, or
 “ at least the opportunities and inducements for inquiry
 “ which the plaintiff had, we find it impossible to
 “ avoid the conclusion that there has been a great de-
 “ lay and neglect on its part to put its claim of right in
 “ force. It is a well settled rule in equity, that if a
 “ party is guilty of laches or unreasonable delay in the
 “ enforcement of his right, he thereby forfeits his claim
 “ to equitable relief. (Citing cases.) *Equity* regards
 “ diligence as one of its important elements, and it dis-
 “ countenances laches as *inequitable*. Unreasonable de-
 “ lay to prosecute an existing claim is a bar to a bill in
 “ equity, especially when the parties cannot be restored
 “ to their original position, and injustice may be done.
 “ *Peabody vs. Flint*, 6 Allen, 52. * * * We cannot
 “ avoid the conclusion that the plaintiff slumbered on
 “ its rights, and has only been roused into activity by
 “ the discovery that the value of the property had in
 “ various ways become unexpectedly large.”

Royal Bank vs. Grand Junction, 125 Mass., 494.

In above opinion, *Brown vs. County*, 95 U. S., 160, is cited, which decides that, though there is a statute of limitations applicable, and which has not run, still if

there is laches the bill will be dismissed on that inherent principle of equity. So in a later case, the Supreme Court of the United States say:

"State claims are never favored in equity, and where
 "gross laches is shown, and unexplained acquiescence
 "in the operation of an adverse right, courts of equity
 "frequently treat the lapse of time, *even for a shorter*
 "*period than the one specified in the statute of limitations,*
 "as a presumptive bar to the claim." (Citing cases.)

Godden vs. Kimmel, 99 U. S., 202.

In other words, the statute of limitations arbitrarily fixes a time beyond which the most equitable claim shall not be enforced. The doctrine of laches says that even within that time, under circumstances, the court of equity will not interfere.

Blanchard vs. Doering, 23 Wis., 200, is another late case where this doctrine of laches was applied to a case where the court below had granted the injunction in a water case, and it is held that "long acquiescence is a
 "bar to the remedy, and especially where it will be
 "productive of hardship and oppression, or public or
 "private mischief." And cases were cited with approval where after a delay of four or five years, in water cases, the court dismissed the bill and turned the plaintiff over to his remedy at law, on the ground of acquiescence.

Especially the case of *Sheldon vs. Rockwell*, 9 Wis., 161, where a bill like this was dismissed, the Court saying:

"There is no doubt of the power of a court of equity
 "to interfere by injunction to prohibit injuries occasioned by the back flowage of water in cases like the
 "present. But in this proceeding there is one feature
 "which we consider conclusive upon the rights of the
 "parties. It is the length of time which the defendant
 "permitted to pass after the erection of the dam in
 "question, and before the commencement of his suit
 "to restrain its construction or continuance. Thirteen

“years passed between the building of the dam and
“the institution of this action. The dam was begun
“in August, 1837; this suit in August, 1856. In less
“than twelve months more his remedy at law, by action
“on the case, would have been barred. In the mean
“time the dam was four times destroyed by floods, and
“as often rebuilt by the defendants. During all the
“time the plaintiff resided in the immediate neighbor-
“hood and upon the premises for the injury to which
“he now complains. With the exception of a verbal
“notice to the defendants, at the time the dam was orig-
“inally built, that its erection would be an infringe-
“ment of his rights, he remained during all the time
“a calm and constant observer of every step taken and
“every movement made by the defendants, without one
“word of complaint or warning. He commenced no
“suit, consulted no attorney. No fraud, misrepresen-
“tation or unfair dealing on the part of the defendants
“is alleged. No accident, mistake or excuse for the
“the delay on his part is set up. After nineteen years
“of profound sleep, he seems suddenly to have awak-
“ened to a sense of his position, and finding the dam
“for a fifth time swept away by high water, and
“defendants engaged in replacing it the same as be-
“fore, he asked of a court of equity that they be re-
“strained. Could a more preposterous proposition be
“urged? A statement of these facts constitute the
“strongest refutation of his claim for relief. The
“granting or refusal of injunctions rests in the sound
“judgment of the Court. They are never granted when
“they are against good conscience or productive of
“hardship, oppression, injustice, or public or private
“mischief. The plaintiff, by his silence and acquies-
“cence, has invited and encouraged the defendants to
“expend their time and means in the construction and
“repairing of the dam and the mills and machinery
“used in connection with it. In them they have a large
“pecuniary interest, and though they may have erected
“them for purposes of private speculation, they are,

"nevertheless, entitled to the consideration of the Court. The public have a large interest in the improvements created by their capital and enterprise."

During the greater portion of the time since the erection of the dam in question the building and maintaining of dams and mills have been so much regarded as matters of public concern, that they have been and now are fostered and protected by statutory laws. For a Court now to interfere and say to the defendants that they shall not rebuild their dam because, by an accident against which it was impossible for them to guard, it has been destroyed, and their mills and machinery thereby rendered temporarily useless, would be an act of gross oppression and injustice.

The Court lends its aid only to the vigilant, active and faithful. This tardy application must be regarded as made in bad faith. After his gross and unparalleled negligence, the plaintiff can have no standing in Court for the purpose of asking the relief here sought. Unreasonable delay and mere lapse of time, independently of any Statute of Limitations, constitute a defence in a Court of *Equity*. This doctrine is very ancient, and established by a great number of decisions.

In the leading case of *Smith vs. Clay*, Ambler, 645, Lord Camden said: "A Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Where these are wanting the Court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of the jurisdiction, there was always a limitation to suits in this Court."

In *Knight vs. Taylor*, 1 Howard, U. S. Rep., 161, a bill filed to adjust matters of account *which were not barred by the Statute of Limitations*, was dismissed for

want of reasonable diligence. Taney, C. J., adopts the language of Lord Campbell, and adds: "It is not merely on presumption of payment, or in analogy to the Statute of Limitations, that a Court of Chancery refuses to lend its aid to stale demands."

In *Haight vs. The Proprietors of the Morris Aqueduct*, 4 Wash. C. C. R., 601, the defendants having had the adverse possession for twenty years of certain water which had previously flowed into plaintiffs' mill-pond, which they had used during that period by means of an aqueduct for supplying water to the town of Morristown, suffered it to go into disuse in consequence of a decay of the logs of the aqueduct for three years during which the water again flowed into the plaintiff's pond. Upon the defendant's commencing the reconstruction of the aqueduct the plaintiffs applied for an injunction, which was refused on the ground that twenty years' possession vested a complete title to the water in the defendants. In passing upon the case Washington, J., says:

"The next objection to the interference of this Court, which I consider to be insuperable is the acquiescence of those under whom the plaintiffs claim in the construction of this aqueduct originally, and in their subsequent enjoyment of the water by which it was supplied, which circumstance, though unaccompanied by long possession, would be sufficient to close the doors of a Court of Equity to this application. In such a case the Court will not only refuse to interfere in favor of the party who has thus acquiesced or been guilty of inexcusable negligence, but will even grant injunctions to restrain actions brought at law for the nuisance."

Although the latter proposition may not be true, the former is undoubtedly the law in such cases.

"In the case of the *Birmingham Canal Company vs. Lloyd*, 18 Vesey, 515, the plaintiffs having permitted the defendants to proceed for nearly two years, and to

“expend a large sum of money in the erection of their
 “machinery, Lord Eldon refused an injunction for the
 “reason that the plaintiffs had not commenced their op-
 “position when they could have done so with justice.

“If in England two years of acquiescence defeats a
 “proceeding like the present, how much less delay ought
 “to suffice for that purpose in a newly settled country
 “like our own, whereby the rapidity of our growth and
 “enterprise a few months oftentimes determines the des-
 “tinies of our cities, villages and places of business?
 “The diligence required by the law ought to be meas-
 “ured by the mischief which would ensue from a want
 “of it.

“The same principles will be found established in the
 “following English and American cases: *Bond vs. Hop-*
 “*kins*, 1 Sch. & Lef., 413, 428; *Hovendon vs. Lord Armes-*
 “*ley*, 2 id., 607, 630 to 640; *Stackhouse vs. Boonston*, 10
 “Ves., 466; *Beckford vs. Wade*, 17 Ves., 466, 467; *Chal-*
 “*mondeley vs. Clinton*, 2 Jac. & Walk., 1, 138 to 152;
 “*Postlock vs. Gordon*, 1 Hare R., 594; *Vigors vs. Pike*, 8
 “Clarke Fin., 650; *Decouche vs. Saventien*, 3 John C. R.,
 “190; *Kane vs. Bloodgood*, 7 id., 93; *Dexter vs. Arnold*, 3
 “Sum., 152; *Pratt vs. Vattier*, 9 Peters, 405, 416, 417;
 “*Sherwood vs. Sutton*, 5 Mason R., 143, 145, 146; *Bow-*
 “*man vs. Mathew*, How. U. S. R., 189; *Gould vs. Gould*,
 “3 Story R., 516; and *Miller vs. Sweaton*, 2 Cax. Ch. R.,
 “102.

* * * * *

“The judgment of the Circuit Court is affirmed with
 “costs.”

Where in an action for flooding the water back upon
 mills in occupation of the plaintiffs, it was shown that
 defendants had omitted to assert their title, though
 knowing the premises belonged to them, and that plain-
 tiffs had purchased them and were making valuable,
 permanent improvements thereon, in the belief that
 they owned them. *Held*, That this silence—this omis-
 sion to assert title—clearly constituted an estoppel, and
 that no evidence could do away with the force of it.

Brown vs. Brown, 30 N. Y., 520.

Demurrer to bill sustained. P. C.—“The suit is
 “one in equity to enjoin and restrain the defend-
 “ants from further building or repairing a wing-
 “dam * * or in any way obstructing the natural
 “flow of the water of that river. * * * There
 “can be no doubt that the Act of 1848 authorized
 “Smith and his associates to construct a dam across
 “Rock River, * * providing the dam was so con-
 “structed as not to flow any lands nor interfere with
 “any privileges they did not own. * * * The dam,
 “to this extent, then, is lawful. * * * And there
 “can be as little doubt that in no possible view could
 “the Legislature authorize them to overflow and injure
 “the lands of others without making them just com-
 “pensation. Were this an action at law brought to
 “recover damages for the injuries which the plaintiffs had
 “sustained * * * we would have no difficulty in
 “sustaining the suit. But it is not. The suit has a
 “double aspect—both to restrain the defendants from
 “making repairs upon a dam already erected, and to
 “have the dam declared a nuisance and abated as such.
 “Do the plaintiffs show themselves entitled to such
 “relief from a court of equity? Or do they show such
 “an acquiescence in the original construction of this
 “dam and raceway, and in the subsequent use and en-
 “joyment of the water power thereby created, as to
 “close a court of equity to this application? * * *
 “It appears that the plaintiffs owned the lands overflowed
 “in 1848. At that time Smith and his associates com-
 “menced erecting the dam and raceway under the
 “authority conferred by the original charter. The
 “plaintiffs saw this dam and raceway erected, and re-
 “built or repaired from time to time. Valuable im-
 “provements were made along this raceway upon the
 “strength of the right to draw and use water from the
 “dam. The plaintiffs acquiesced in this state of things
 “for *several years*; and now ought they to be permitted
 “to come into a court of equity and obtain an injunction
 “restraining the defendants from further building or

“repairing the dam, when such valuable improvements
 “have been made upon the expectation of enjoying the
 “privilege of getting water from the dam? It appears
 “to us not. The case falls fully within the principle
 “and reason of the rule laid down in *Sheldon vs. Rock-*
 “*well*, 9 Wis., 166. In that case it was said that the
 “granting or refusing an injunction rested in the sound
 “discretion of the Court, and that one was never granted
 “when it was against good conscience or would be pro-
 “ductive of hardship or private or public mischief.
 “There can be no doubt about the correctness of this
 “doctrine. If the plaintiffs have sustained any dam-
 “age in consequence of the flowage of their land, they
 “have their common-law remedy.”

Cobb vs. Smith, 16 Wis., 696.

“If a party having a right stands by and sees an-
 “other dealing with the property in a manner inconsis-
 “tent with that right, and makes no objection while the
 “act is in progress, he cannot afterwards complain.”
 Lord Cottenham.

Blake vs. Guild, 2 Phillips, 111.

“Long continued acquiescence in the erection of
 “works which it is afterwards sought to enjoin as a nui-
 “sance, may constitute a bar to relief in equity. And
 “it may be asserted as a rule that long delay upon the
 “part of plaintiff who seeks to enjoin a nuisance will
 “afford sufficient reason for refusing to him re-
 “lief in equity. The rule is extended even further,
 “and it has been held that one party may so encourage
 “another in the erecting of what he afterwards complains
 “of as a nuisance, as to give the adverse party a right
 “to invoke the aid of equity to restrain proceedings at
 “law for the recovery of damages,” etc.

High. §756.

“So it is requisite that a complainant seeking the aid
 “of a court of equity by injunction shall not have been

“guilty of laches or delay in the assertion of his rights,
 “for, while delay may not amount to proof of acquies-
 “cence in the wrong for which he seeks redress, it may
 “yet suffice to prevent his obtaining relief by injunc-
 “tion.”

High. §7.

A. D. 1875. Bill to enjoin use of trade-mark. Dis-
 missed for laches. The Court say the plaintiff knew of
 the infringement in January, 1874, “and under these
 “circumstances, had the plaintiffs applied in proper
 “time, I am not prepared to say that they would not
 “have been entitled to an injunction. On the con-
 “trary, as at present advised, I think that they would
 “have been.” But as they delayed the application un-
 til August of the same year—some seven months—the
 Court holds that after such delay it could not be said
 it would be according to the practice of a court of equity
 to interfere.

Estcourt vs. Estcourt Co., L. R. 10, ch. 279.

“There is no principle better established in this
 “Court, nor one founded on more solid considerations
 “of equity and public utility, than that which declares
 “that if one man knowingly, though he does it pas-
 “sively, by looking on, suffers another to purchase and
 “expend money on land under an erroneous impres-
 “sion of title, *without making known his claim*, he shall
 “not afterwards be permitted to exercise his legal right
 “against such person. It would be an act of fraud and
 “injustice, and his conscience is bound by this equita-
 “ble estoppel. *Qui tacet, consentire videtur. Qui po-*
 “*test et debet vetare, jubet.*”

Wendell vs. Van Rensselaer, 1 Johns., ch. 353.

In *Ware vs. Regents*, 3 DeGex and Jones, 230, where
 an injunction was sought to restrain a nuisance by
 flooding, etc. The bill was dismissed by the Vice-
 Chancellor on the ground that the complainant must be

left to his remedy at law. The Lord Chancellor, in affirming the decision below, said: "The plaintiff was not very urgent in his complaints, nor was he very active in his measures for obtaining redress for any alleged injury; for * * * he waits for a period of *one year and eight months*, and then files his bill." * * (p. 220). Again (p. 230): "If the plaintiff had come immediately after the flooding of his lands * * he might possibly have had some grounds to ask the Court to interfere for his protection, not merely against threatened mischief but against mischief actually produced, with the means and opportunity of repetition. * * * Now, upon the question whether I am to grant the injunction, I cannot avoid being influenced by the delay which has occurred in the institution of proceedings by the plaintiff, which, though not amounting to absolute proof of acquiescence, yet is calculated to throw considerable doubt upon the reality of his alleged injury, and compels me to weigh the amount of inconvenience which he will sustain by my refusal of this particular remedy against the serious consequences which must result to the company from an order which will oblige them to alter the state and condition of their works, etc."

In *Goodin vs. Cin., etc.*, 18 Ohio St., 171, a delay of about two years to apply to equity for relief against a nuisance was held such laches as to bar relief *at the hearing*. The defendant had expended about \$1,000,000 and plaintiff had stood silently by. The Court say the omission to sue in due time constitutes "an implied assent;" that "he who will not speak when he *should*, will not be allowed to speak when he *would*. He must have shown himself prompt and vigilant in the assertion of his rights. * * It will not do for him to wait until the mischief of which he complains has been accomplished, fortunes expended, and great public interests created. If he does he must be held to have acquiesced in the change, or to content himself *with some other form of remedy*."

In another case, the Supreme Court of Ohio say of a plaintiff: "Remaining inactive and silent until his swamp lands were drained by a ditch of nearly a mile in length, he then, for the first time, asks the interposition of a Court of Equity. We think he comes too late."

The case of *Wiggin vs. The Mayor, etc.*, 9 Paige, 24, was a case in which an injunction was sought to restrain a city corporation from the enforcement of an assessment levied to pay for the improvement of a street; and the remarks of Chancellor Walworth in that case are very pertinent here. He says: "There is another substantial reason why this Court should not interfere in this case by injunction, * * but should leave the complainant, if he has any, to his remedy at law. The proceedings for the making of the improvement were commenced nearly five years since, and the complainant had waited until the improvement had actually been completed several months before he or his agent attempted to interfere."

Kellogg vs. Ely, 15 Ohio St., 67.

In *Parrott vs. Palmer*, 3 Myl. & K., 639, the right of plaintiff, not merely to provisional, but to any equitable relief, even at the hearing, was denied for laches. P. C.—"If there be anything well established in this Court, it is that a person who lies by while he sees another person expend his capital and bestow his labor upon any work, without giving to that person notice, is attempting to interrupt him—one who thus acquiesces in proceedings inconsistent with his own claims—when he comes to enforce those claims in this Court shall in vain ask for its interposition by an injunction, of which the effect would be to render all the expense useless which he voluntarily suffered to be incurred."

"It is a maxim that *vigilantibus non dormientibus, æquitas subvenit*—the meaning of which is, that equity

“discountenances laches, and *independently of any statute of limitations*, has always refused to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. * * Under such circumstances it would, in many cases, be impossible to interfere without doing injustice to third persons who had acquired interests in the property during the intervening period. * * * In general, nothing can call forth a court of equity into activity but conscience, good faith, and personal diligence.”—Smith’s Manual of Equity, 19.

The distinction between cases where laches is alleged as a reason why a complainant shall not have *equitable* relief, and where it is asserted as a bar to an action at law, or as giving the party guilty of the nuisance himself a standing as complainant in equity, to prevent the party injured availing himself of his *legal* remedies, is patent, and is well illustrated by the opinion of Lord John Romilly, cited by Wood as “a masterly opinion which commends itself as an authority because of the cogency of its reasoning and the soundness of its doctrine.” The case is *Bankhardt vs. Houghton*, 27 Beavan, 425. There Houghton had obtained a verdict at law against Bankhardt for a nuisance, and thereupon Bankhardt filed his bill for an injunction against Houghton to restrain the enforcement of the judgment at law, on the ground of acquiescence in the nuisance. The evidence rather established a passive non-interference than a strict acquiescence. P. C.—“There are two questions to be considered in this case. First, the extent of acquiescence alleged and proved; and second, the legal consequence of such acquiescence as is proved. On the first, as to the acquiescence, this is proved, and indeed not contested by the defendant. First, that the termor and the defendant, when he took the farm, were well aware of the extent of the works, and that the tenants who assigned the lease to the defendant had seen them while they were being

“erected, and did not take any steps to prevent the
 “erection. These facts are very material for some pur-
 “poses, and *if the present case were reversed*, and the de-
 “fendant was here seeking to restrain the plaintiffs * *
 “I should, on the facts, deem that the defendant was
 “debarred from any right to obtain any such relief as
 “is afforded by an injunction, and that he must be left
 “to his remedy at law.” In the text Wood says: “If
 “the dam itself is so erected as to produce damage to
 “the lands of supra-riparian owners, it is a nuisance,
 “and parties injured thereby are not estopped from a
 “recovery for injuries therefor upon the ground of ac-
 “quiescence in its construction, unless it could reason-
 “ably have been ascertained or foreseen at the time of
 “its erection that it would produce the ill results com-
 “plained of. In this respect *it stands precisely upon the*
 “*same grounds as any other nuisance*, and the rule in ref-
 “erence to acquiescence therein, and estoppel by reason
 “of acquiescence, is that when a person acquiesces in
 “the erection or maintenance of anything that is a nui-
 “sance *per se*, or that he might reasonably have fore-
 “seen could become a nuisance, a *court of equity* will
 “not interfere by injunction to relieve him from the ef-
 “fects thereof, but his remedy at law remains,” etc.

Wood on Nuisances, §360.

“And now suits in equity are expressly confined to
 “the period allowed for actions at law. * * * But
 “though this is the limit, yet the Act does not interfere
 “with any rule or jurisdiction of courts of equity in
 “refusing relief, on the ground of acquiescence or
 “otherwise, to any person whose right to bring a suit
 “may not be barred by the Act. *The time may be short-*
 “*ened, it cannot be lengthened.*”

1 Sugden, V. & P. (254), 389.

“Parties who would have had the clearest title to re-
 “lief, had they come in reasonable time, may deprive

“themselves of this *equity* by a delay which falls short
“of the period fixed by the statutes.”

Ib., P. 388.

2 Spence, Eq. Jur., 61, 62.

So our statutes of limitation, though binding in courts of equity, fall within the rule above quoted from Sugden. In a late New York case, the Court say: “It
“is not claimed that there is a statute of limitations
“within which the case falls. The defense of the respondent rests upon the *laches* of the petitioner—that
“is to say, upon his slackness or negligence in prosecuting his right. The doctrine which is shortly indicated by that word is that, for the peace of society,
“a court will refuse to interfere, though there is no
“statute of limitations applicable, yet there has
“been gross neglect in prosecuting rights, or long and
“unreasonable acquiescence in the assertion of adverse
“rights. A court of equity is never active against
“public convenience, and refuses its aid where a party
“has slept upon his right. (*Smith vs. Clay*, Ambler, 645.) “What length of neglect to enforce a right
“will bring a case under the operation of this rule may
“not be abstractedly determined. Regard must be
“had to all the circumstances of the case, especially
“to such as show a change in property or the relative
“position of parties or persons interested or affected.
“In one case a delay of fourteen months was held to
“be fatal (*McMurray vs. Noyes*, 72 N. Y., 523); because
“in that time the value of certain property had been so
“changed by accidental causes as that the situation of
“the parties was materially affected. In another case
“a delay of four years was held fatal. * * * It is
“said that this proceeding is analagous to a bill to remove a cloud upon title, and it is insisted that no
“*laches* of the owner will defeat his claim for relief.
“The case of *Miner vs. Beekman* (50 N. Y., 337) is cited.
“That case does not in its facts, or in the reasoning of
“the opinion, touch the doctrine that the right to relief

"may be lost by the *laches* of the protestant. The judgment there was put upon the ground that the right to sue had accrued within ten years of the commencement of the action; that the Statute of Limitations applicable to the case was that of ten years. The question raised, discussed and determined was whether the action was barred by the statute. No application of the equitable doctrine we have named was sought, nor was it pronounced impossible."

Matters of Land, 78 N. Y., 112.

So, in a late English work it is said that "the general tendency of *modern* decisions is to increasingly discourage State demands."

1 Dart., V. & P., 41.

It is not necessary for us to go in this case to the length of contending that it is always *indispensable* first to establish title at law before coming to equity for an injunction, nor that mere lapse of time, short of the statute of limitations, will bar the *equitable* remedy. But only that under circumstances of delay, with knowledge, great expenditure, large interests affecting whole communities, absence of real loss, injury or damage, the Chancellor may refuse equitable relief. And we have made the lengthy extracts *supra*, to show fully the course and practice of equity in *similar* cases—for all the authorities agree that there is no general, rigid rule, and could not be without perversion of the principles of equitable as distinguished from common law jurisprudence.

"An injunction will not be granted when it will operate inequitably or contrary to the real justice of the case."

T. & B., etc., vs. B. H., etc., 86 N. Y. 125-6, A. D. 1881.

The allegation and proof that defendants were insol-

vent, essential to authorize the equitable relief prayed for *under the circumstances of this case*.

Dunkart vs. Rinehart, 16 The Reporter, 243.

For the quotation from Pomeroy, (App. pts and authorities, p. 428,) only two cases are cited by the author, and neither of which sustains him.

In one of them the Court say: "An unlawful obstruction by the defendant of an ancient, though not very valuable light, has been established. On the other hand, this obstruction took place nearly six years before the bill was filed, under the very eyes of the plaintiffs, * * and the light does not appear to have been, for any practicable purpose, missed or wanted since its obstruction. A bill for an injunction in such a case would, I think, before the passing of Lord Cairns' Act, have been dismissed, and the plaintiffs would have been left to their remedy at law. Since that Act, if the bill were not dismissed, I should certainly agree with the Master of the Rolls in thinking the case one for an inquiry as to damages, and not for an injunction. * * I have come to the conclusion that the bill ought to be altogether dismissed, without prejudice to any *action* which the plaintiffs may be advised to bring."

Grant vs. Fynny, L. R. 8, ch. 14.

In the other case it is said that a *mere* delay of less than two years would not disentitle the plaintiff to equitable relief; that "the right asserted is a legal right. * * Such an action is subject to the Statute of Limitations, and * * the injunction is sought merely in aid of the legal right. In such case the injunction is * * a matter of course if the legal right be proved to exist. *In saying that I do not shut my eyes to the possible existence, in other cases, of a purely equitable defence, such as acquiescence, etc. But mere lapse of time, unaccompanied by anything else (and to that I confine my observations) has * * just*

“as much effect, and no more, in barring a suit for an injunction, as it has in barring an action for deceit.”

Fullwood vs. Fullwood, L. R. 9 Ch. Div., 176.

F

None of the cases cited by appellants in their “Points and Authorities” sustain the contention that any reversible error was committed in excluding the testimony offered as “rebutting evidence.”

From some of them we have sufficiently quoted *supra*, by anticipation, to show this. As to the others, appellants say (p. 73) they find but one case (*Rowe vs. Brenton*) in point as to the channel.

This case is a fair sample of the whole. They are cases where the ruling was made at *nisi prius*, and the ruling never assigned as error; or if so assigned and passed upon, affirmed as matter of discretion, because the testimony was *admitted*, and *not rejected*; or when the ruling was, by consent or not, excepted to at all; or where the evidence rejected was on a point for the first time brought out by the other party, after the party offering it had rested, and consequently the appellate Court could and did say that it was offered at the very first opportunity and to rebut a new point, the making of which could not have been anticipated. Thus the report of *Rowe vs. Brenton*, in 3d Manning and Ryland, shows that the plaintiff improperly kept back his proof of title altogether, and rested on proof of possession alone. This it was which caused all the confusion and entanglement which followed. After a refusal to non-suit (p. 139), “It was then urged by the Attorney-General and Sir J. Scarlett, that if the plaintiff stopped here he could not afterwards go into evidence of property, but that he would be entitled only to contradict witnesses to particular facts. Lord Tenterden, C. J.—*There may be great difficulty in giv-*

“ing further evidence. Bayley, J.—Where evidence is given on one particular point, you give the whole of your evidence upon that point.”

After defendant closed (p. 281) the plaintiff called evidence in reply, and “then counsel for the defendant here urged that the plaintiff having in the outset given evidence of possession, he had no right now to support that possession by evidence of title; and *Rees vs. Smith*, 2 Starkie, N. P. C., the accuracy of which report was confirmed by Sir J. Scarlett, was cited. *But as the defendants’ counsel rather protested against the course proposed * * * becoming a precedent, than required the rejection of the evidence in the present instance, Lord Tenterden said: ‘As they do not object, you will go on.’*” The plaintiff then proceeded to prove title, etc., and after he rested (p. 304) the defendant’s counsel stated, as is plainly to be inferred, that as the plaintiff had reserved evidence upon the particular point of the taking of ore from a place called Holmbush till after defendant had rested, they offered to rebut it, which they were allowed to do, the Court saying in effect that that was the very first opportunity they had. *Rowe vs. Brenton* might have some resemblance to our case if the plaintiff there had attempted to prove title in chief, and had also anticipated the defense by giving some evidence in chief that defendant had no right to take ore at Holmbush, and then claimed the right to cumulate such proof as rebuttal. Again, the Court, at *nisi prius*, did admit the evidence, as it might in its discretion, even if not strictly rebutting, especially as the plaintiff invited the exercise of such discretion by seeking an advantage in holding back part of his case.

Morris vs. Wadsworth is simply a case where the testimony was *admitted*, and, as being matter of discretion, the Appellate Court refused to interfere. The syllabus correctly states the case. “A plaintiff,” it says, “may be permitted to shift his ground and produce evi-

“dence showing a right to recover, although entirely
 “variant from that primarily given, and this Court will
 “not ordinarily *review the exercise of such discretion.*”

Scott vs. Woodward simply decides that it is error to reject proper rebuttal, when the testimony is not held back but is offered at the first opportunity. One illustration given is where defendant proves a release, and in rebuttal plaintiff offers to prove it a forgery. Such testimony is rebuttal within the strictest rules. So when plaintiff shows a grant, defendant may show an older grant. It would be strict rebuttal to show the older grant a forgery, and if adverse possession is also rebuttal, it must be on the same principle, that it destroys the older grant. But if plaintiff, having himself pleaded the older grant of defendant, and in making his own case in chief given some evidence on the point of adverse possession, thus anticipating defendant's case both by his own pleading and proof, had offered in rebuttal evidence of a third grant, the case would have been something more like ours.

Doe vs. Gorley, also cited by appellant, falls within the same category, except that there the case was a *nisi prius* case and the evidence was *admitted*, not rejected. But it differs from our case in that the evidence was admitted as being rebuttal in that it was not the setting up a new claim or different claim of title, but as tending to counteract the case made by the defendant, the latter will being treated as a *revocation* of that set up by defendant; and so the counsel put it, saying they relied solely on the title as first put in by them in the opening, and only wished to put in the will to show the revocation. The case cited by us from 5th Hill, *Leland vs. Blount*, shows the distinction plainly.

The *nisi prius* case of *Gilpins vs. Consiqua* recognizes the same distinction, so confining rebuttal as the syllabus shows: “Plaintiff may * * explain or contradict evidence which comes out upon the defendant's examination, but not if in the opening the plaintiff had given evidence of the same matter,” etc.

The case of *Union Co. vs. Crary* is not, we think, fairly stated by counsel. It is in fact an authority for us. The only thing *decided* was that certain testimony was properly ruled out, being "admissible only in the discretion of the Court below, * * not in rebuttal, but as part of the plaintiff's original case."

Wade vs. Thayer only holds that when for the first time in the progress of the trial, the defendant, after the plaintiff had rested, introduces evidence tending to impeach the witnesses of the plaintiff, the plaintiff may contradict such evidence in rebuttal, *because* it is his first and only opportunity to do so. And so was *Lisman vs. Early*. The evidence was held strictly rebutting, and on a point where the defendant had the *onus*, and such as the plaintiff could not possibly anticipate. And the same may be said of *Hayward vs. Draper*. when the evidence was held proper rebuttal, because "the plaintiff had no opportunity to meet *this particular piece of evidence* until the defendant produced it. * * "It was not new evidence to support the issue in chief, * * but it was evidence offered and competent for *the single purpose* of impairing the effect of a piece of testimony introduced by the defendants."

The case of *Briggs vs. Aynesworth* was a *nisi prius* case, and was, as is shown by the reporter's notes, as well as by the observation of Lord Denman, that the proper course would have been to introduce the evidence in the opening, simply a case where the evidence was *admitted* in the exercise of discretion. But further, it was evidence which went *directly* to the point made by the evidence of the defendant. As much so as would evidence in our case showing that the Calloway notice was not posted. The true rule is stated in the reporter's note, and is upheld by Lord Denman in subsequent cases cited by us, *e. g.*, "evidence which the plaintiff might have given in chief is inadmissible in reply."

Sample vs. Robb is another case of *discretion*. The ruling below was affirmed on that ground, the Court

expressly saying it did not matter whether it was strictly rebuttal or not.

The Vermont and Iowa cases cited have no force here, because they proceed upon the principle that in those jurisdictions the rules of rebutting testimony are not in force, while it has always been part of our jurisprudence, and is expressly enacted in our Code.

Even if the appellants had confined themselves in their opening to prove generally a continuous stream or channel from the Calloway to their lands, it would not have been proper in rebuttal to show the existence of a channel at specific points where we disproved their opening case by showing there was none. But they did not so confine themselves. On the contrary, in opening they attempted to prove and gave evidence on the existence of the channel at *every point* throughout that distance. See McCray, vol. 2, folios 376, 378, 379, 383, 386, 396-399, 408, 424, 426, 427, 433-440, 440-452, 453, 459; Crocker, folios 494, 502, 504, 576, 686; Sill, folio 770; McCray, folios 817, 837, 850, 852, 855; Tracy, folios 965, Dover, folios 1262, 1266; Rogers, folios 1308, 1309; Barnes, folios 1330, 1345; Gibbes, folios 1407, 1410; McCray, folios 1619 *et seq.*, 1649, 1651; Norton, folios 1671, *et seq.*, 1679, 1681, 1683, 1684, 1685, 1698; Wible, folios 1765-1762, 1863-1767, 1770, 1771, 1775, 1777, 1778, 1780, 1784; Epperly, folios 2171, 2173, 2175, 2178, 2181-2183, 2184, 2186, 2187-2228.

They say it was error to refuse them the right in rebuttal to go again into the question of the amount of water in the river, and claim the right to do so as disproving our evidence of evaporation. But here again the evidence was cumulative. In their opening they went into testimony on this very point of the quantity of water, and one of their witnesses, who testified before they rested, testified on this very question of evaporation. They proved by many witnesses that the water would flow into Buena Vista Lake till it was full, and then turned north—that is that it did not all evaporate.

in the lake, *e. g.* Crocker, Vol. 2, fol. 526-7. Our proof of evaporation only meets that, and for them to prove over again the quantity in the river above is only to cumulate their original case. Crocker testified (Vol. 2, fol. 725) as to amount of water in Kern River in ordinary seasons, and P. S. Jewett as to amount at the Calloway in 1881 (fol. 1460); and Davidson (fols. 1473-78, 1480) testified to an exact measurement of the water in the river; Wible (fol. 1827) to amount of water in the river at the Calloway in 1881. At folio 1931 he testified as to lake getting lower by evaporation without overflowing—the very point on which they say they were not allowed to give further evidence in rebuttal. At folios 2117 to 2118 he testified to quantity flowing down river as compared with that flowing into the Calloway. This, in connection with Robert's testimony, shows that the plaintiff in opening went fully into this very specific question of the amount of water in the river. At folios 274-282 Roberts testified as to quantity of water in the Calloway in 1876, April, 1877, May, 1877, August, 1877, 1878, 1879, 1880 and A. D. 1881, up to time of trial; as to depth of water in canal at those dates, and as to width of head-gate ever since 1876; that the canal did not take all the water of the river at any time since 1876; gives grade of canal slope and widths. Farmer (fol. 2135) testified as to amount of water in river, and Willow (fols. 2347 to 2349) does the same. At folio 1028, vol. 3, appellants prove by Mendell that in 1873 he measured the river about ten miles above Bakersfield and found it about 2,500 cubic feet per second; and at folio 1088-1091, by Schuyler the amount of water at Rio Bravo in January, 1879, was about 500 cubic feet per second; at folio 1106, that he measured the water of the river at mouth of cañon, January, 1879, and found it 389 cubic feet per second.

The plaintiff also in opening went into the question of our appropriation, and called McCann (fols. 2152-2170), who testified at length in regard to the construction of and use of water by Calloway from 1875 to 1881,

when Calloway and his associates conveyed that property to defendant, etc.

Burden vs. Stein, if it decides anything more than that mere lapse of time short of the Statute of Limitations (and this seems to be its whole scope), will not be a bar in equity any more than at law, is in conflict with all the other authorities and with the well-settled and universally recognized principles of equity jurisdiction.

Shamleffer vs. Peerlus, 18 Kan., 32, does not deny the doctrine of laches. The decision is put on the expressed grounds that the plaintiff was a minor and therefore incapable of acquiescence, and that there was "*no pretense that she knew anything of the work*, and that the defendant knew it had no right to divert." This is the opposite of our case. Plaintiff here was capable, had knowledge, and defendants had the right to suppose that every citizen here has the right to divert unused waters on the public lands.

The citation (App. P'ts and Au., 427) of "6 Wait's A. & D., 208," must be a clerical mistake. We presume page 281 was intended. That says: "A complainant who asks the Court to restrain by injunction a threatened invasion of his rights must show * * * that he has been guilty of no delay * * * (p. 282). "Where the damage is not serious, * * * equity will not interfere, * * * and if it appears that the removal of an obstruction *will still leave it impossible for the party claiming the right to it to derive any benefit from it*, a Court of Equity will not lend its aid to a removal."

Page 270: "The anomalous condition of the settlers and miners upon the public lands in California has induced the Courts of that State *to depart from the strict rules of the common law*, and to recognize priority of appropriation as a foundation of right to the use of running water."

Morrill vs. St. Anthony seems from the meagre report only to hold as the syllabus says "that mere delay does not work an estoppel." The decision and finding in the case were against the claim of laches and acquiescence, if any such defense was set up, and the Court above say the evidence justified that finding. What the circumstances were is not disclosed. The Court may have thought there were no equitable reasons, that defendant had no knowledge, that there were no great expenditures, etc., etc.

Dugan vs. Gittings controverts none of the cases we have cited on acquiescence and laches. It is like the others that where the Statute of Limitations is alone relied on in equity, as at law, mere delay short of the statutory period will not suffice.

That we are correct in this estimate of the cases cited by appellants is also shown by a later decision of one of the same Courts, rendered in A. D. 1879, and directly in point here. There the delay was less than two years, but the Court, in an able opinion, citing the authorities, apply the rule of equity, and hold that, having delayed so even after he had become fully acquainted with the consequences to him and his property of such diversion, he had no remedy in equity.

Thomas vs. Woodman, 23 Kansas, 217.

To the same point, we ask the particular attention of the Court to the late case of *Hough vs. Doylestown*, 4 Brewster Pa., 345, where the distinction between a preliminary and final injunction is taken, and on the final hearing the bill was dismissed, the Court summing up a full and able discussion of all the questions by saying: "The law upon this point is well settled. A plaintiff must show that he has not been guilty of any improper delay in applying for the injunction of the Court, not acquiescence in the sense of conferring a right upon another party, but acquiescence in the sense of depriving of the right of interference of a court of equity;

“and more especially he forfeits his rights by laches,
 “being cognizant of his rights, if he does not take those
 “steps to assert them which are open to him, but lies
 “by and suffers other parties to incur expenses and en-
 “ter into engagements and contracts of a burdensome
 “character.”

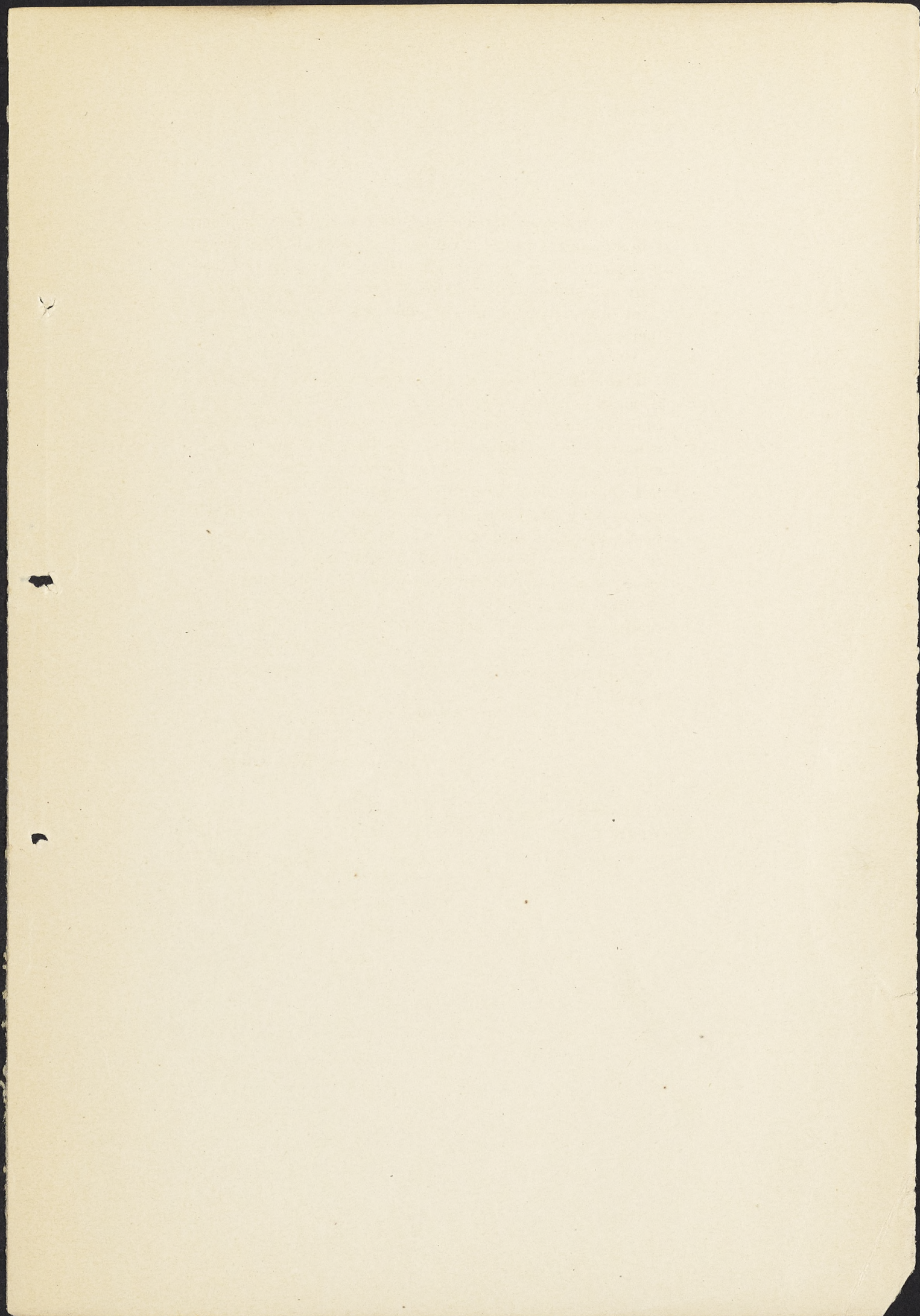
The case of *Stockman vs. Riverside*, in this Court, is, if possible, still wider of the mark. That was an action to quiet title, or a species of action under our Code where the legal rights, strictly speaking, are put in issue and determined—an action of ejectment upside down; no appeal to the extraordinary powers of equity. To have upheld the decision of the Court below would have been simply to have decided, on less patent grounds, the question of estoppel at law—left undecided in the case above quoted from Brewster. Again, there the estoppel was sought to be used as translativ^e of title to realty, not only as restricting the remedy to law. And your Honors say there is no authority that upon such facts an *estoppel* arises. (Citing cases on technical estoppel.)

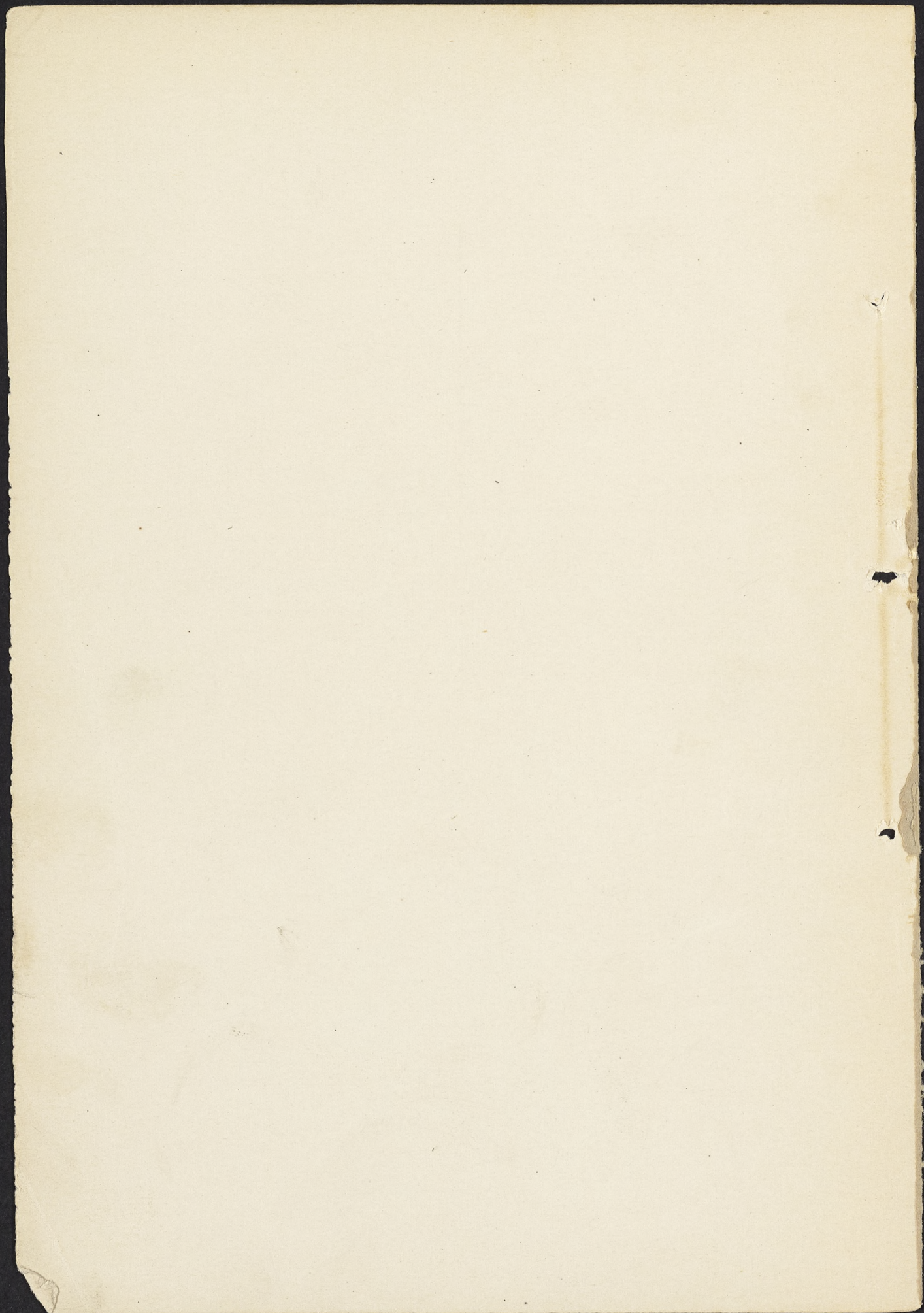
Respectfully submitted,

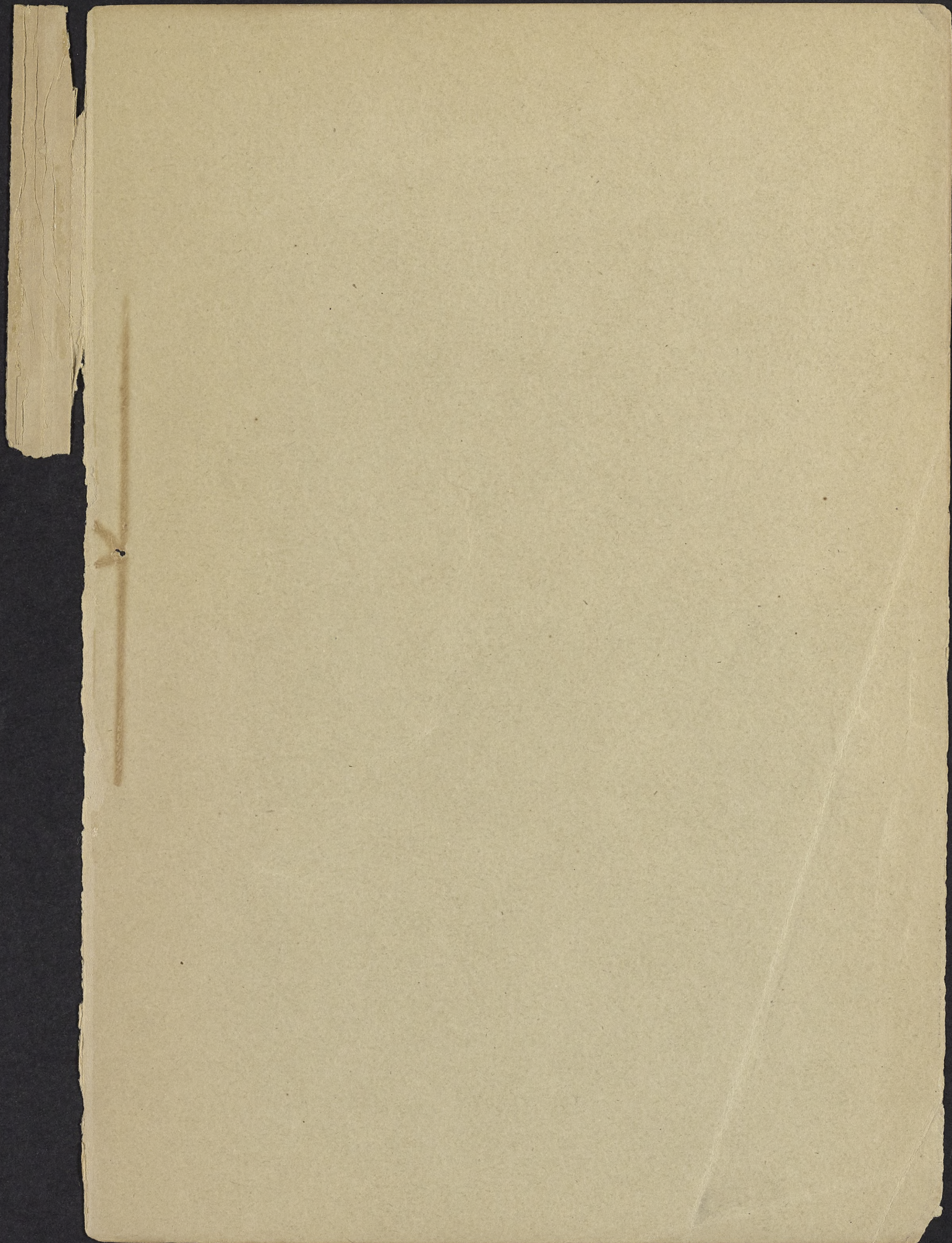
LOUIS T. HAGGIN,
 Attorney for Respondent.

GARBER, THORNTON & BISHOP,
 FLOURNOY, MHOON & FLOURNOY.

Of Counsel for Respondent.







Service of the within Points and Authorities
by copy, is admitted this

5th

day of

1883.

Sept.

Gutten & Houghton

Accept for Affs.